FILED

971578 MAR 2 3 1998

OFFICE OF THE CLERK

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

ANDREA BEAR FIELD
MAIDA O. LERNER
DAVID S. HARLOW
LEE A. CASEY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

DOUGLAS W. DAVIS
JOHN CHARLES THOMAS
CYNTHIA S. CECIL
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

March 23, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

230 pp

QUESTIONS PRESENTED

The Fourth Circuit held that it was bound—by decisions of this Court—to defer to an EPA post-rulemaking regulatory interpretation that contradicted the interpretation expressed by EPA's Administrator when he published the rule in 1984. Although finding that Petitioner did not receive constitutionally adequate notice of that EPA interpretation until 1989—five years after the rule was published—the Fourth Circuit nonetheless held that Petitioner faced liability for violating the rule starting just three months after Petitioner finally got "fair notice." If Petitioner had received fair notice from the start, Petitioner would have had up to two years in which to comply. The questions presented are these:

1. Whether this Court's deference standard forces a reviewing court to defer to a post-promulgation, secret interpretation of a rule, developed by an agency without following notice-and-comment rulemaking procedures.

2. Whether a federal court ignores its historical duty to say what the law is by deferring to an agency interpretation that is measured not by reasonableness but by a not "nonsensical" test.

3. Whether basic principles of due process are violated when a regulated entity is given less time in which to comply with a rule than it would have had if it had received good notice *ab initio*.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Effective January 1, 1998, the name of Petitioner, Hoechst Celanese Corporation, a Delaware Corporation, was changed to HNA Holdings, Inc. (HNA). HNA is wholly owned by Hoechst Corporation, a Delaware Corporation, which is wholly owned by Hoechst Aktiengesellschaft (Hoechst AG), a publicly held corporation organized and existing under the laws of the Federal Republic of Germany. Hoechst AG's shares and depository receipts are traded on the Frankfurt, London, Amsterdam, Brussels, Luxembourg, Paris, Vienna, Zurich, Tokyo and New York stock exchanges.

HNA participates in the following joint ventures:

- IB Chemical Company, a New York general partnership which is 50% owned by VirChem, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA and 50% owned by Mitsubishi;
- Hoechst Diafoil Company, a Delaware general partnership which is 66.7% owned by US PET Film, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA and 33.3% owned by Diafoil USA, Inc., a Delaware Corporation wholly owned by Mitsubishi;
- Clear Lake Methanol Co. LLC, a Delaware limited liability company which is 50% owned by Celanese Chemicals, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA, and 50% owned by Valero Javelina Corporation;
- Clear Lake Methanol Co. LP, a Texas limited partnership which is 49.5% owned by Celanese Chemicals, Inc., a Delaware Corporation which is an indirect wholly-owned subsidiary of HNA, 49.5% owned by Valero Javelina Corporation, and 1% owned by Clear Lake Methanol Co., LLC;

- Fortron Industries, a North Carolina general partnership which is 50% owned by HCC Fortron, Inc., a Delaware Corporation and a wholly-owned subsidiary of HNA, and 50% owned by Kureha KPS, Inc.;
- Polyplastics Co., Ltd., a Japanese corporation which is 45.0% owned by Ticona LLC, a Delaware limited liability company and a wholly owned subsidiary of HNA, and 55% owned by Daicel Ltd., a Japanese corporation;
- DyStar LP, a North Carolina limited partnership which is 49.5% owned by Hoechst Celanese Dyes Company, a Delaware corporation and a wholly-owned subsidiary of HNA, 49.5% owned by Bayer Corporation, and 1% owned by DyStar Corporation, a Delaware corporation which is 50% indirectly owned by Bayer AG and 50% indirectly owned by Hoechst AG;
- Dyneon LLC, a Delaware limited liability company which is 7.6% owned by Hoechst Celanese Fluoropolymer Holdings, Inc., a Pennsylvania corporation and a wholly owned subsidiary of HNA, 38.8% by Hoechst Fluoropolymer Holdings, Inc., a Delaware corporation and a wholly owned subsidiary of Hoechst AG, and 54.6% owned by the Minnesota Mining and Manufacturing Corporation;
- CTE Petrochemicals Company, a Grand Cayman, British West Indies corporation which is 50% owned by Elwood Insurance Limited, a Bermuda corporation and a wholly owned subsidiary of HNA and 50% owned by Panhandle Eastern Corporation;
- Kunming Cellulose Fibers Company Limited, a corporation of the People's Republic of China, which is 30% owned by Celanese Far East Limited, a Hong Kong Corporation and an indirect wholly owned subsidiary of HNA, and 70% owned by Chinese investors;

- Zhuhai Cellulose Fibers Company Limited, a corporation of the People's Republic of China, which is 30% owned by Celanese Far East Limited, a Hong Kong Corporation and an indirect wholly owned subsidiary of HNA, and 70% owned by Chinese investors;
- Nantong Cellulose Fibers Company Limited, a corporation of the People's Republic of China, which is 30.7% owned by Celanese Fibers Operations Limited, a Delaware Corporation and an indirect wholly owned subsidiary of HNA, and 70% owned by Chinese investors;
- AQF Technologies, LLC, a Delaware limited liability company which is 85% owned by AQF Holding, Inc., a Delaware corporation and a wholly owned subsiidary of HNA and 15% owned by BBA US, Inc.

HNA has significant ownership interest in the following publicly traded companies:

- Celanese Canada, Inc., a Canadian corporation, 56.2% owned by Celanese Overseas Corporation, a Delaware Corporation and a wholly-owned subsidiary of HNA. The remaining 43.8% are owned by third parties. The shares of Celanese Canada are publicly traded on the Montreal and Toronto stock exchanges;
- Grupo Celanese SA, a Mexican corporation, is 40% owned by HNA, 11.1% owned by Hoechst Corporation, and 48.9% owned by third parties. The shares of Grupo Celanese are publicly traded on the Mexican stock exchange;
- Interactive Radiation, Inc., a New Jersey Corporation is 21.6% owned by HNA and 78.4% by third parties. The shares of Interactive Radiation are publicly traded on the over the counter market.

HNA has investments of less than 7.5% in the following companies:

- MBW Ventures Limited, a Michigan limited partnership—2.7%
- NPC Services, Inc., a Louisiana corporation—4.3%
- Japan/US Venture Partners, a California limited partnership—6.7%
- Tortuga Casualty Co., a Grand Cayman corporation —4.76%
- United Insurance Company, a Grand Cayman corporation—5.0%
- Delta Holding Inc., a Delaware Corporation—3.1%

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	x
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. THIS COURT SHOULD MAKE CLEAR TO THE FEDERAL COURTS THAT *UDALL v. TALLMAN* DEFERENCE DOES NOT MEAN THAT THE COURTS MUST DEFER TO AGENCY INTERPRETATIONS OF REGULATIONS IN VIRTUALLY ALL CASES	11
A. The Fourth Circuit and Other Circuits Have Deviated from This Court's Basic Deference Principles	11
B. The Agencies—Having Learned That Their Power Has Virtually No Court-Imposed Limits—Have Responded By Running Roughshod Over Both the Statutes Constraining Their Behavior and the Regulated Community	13
II. THE CASE PROVIDES AN APPROPRIATE VEHICLE FOR REASSERTING THE PROPER RULES GOVERNING JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS	14

TABLE OF CONTENTS—Continued

Page

A. This Court Should Make Clear That It Is Not Appropriate For Federal Courts to Defer to Agency Interpretations That Defy the Very Language of a Published Rule 15

B. This Court Should Not Allow the Federal Courts to Defer to Latter Day Agency Interpretations that Contradict Agency Explanations Made When the Rule Was Promulgated 16

C. The Federal Courts Should Not Defer to the Latest in a Series of Agency Interpretations 17

III. IN ADDITION, THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR CONSIDERING WHETHER THE FEDERAL COURTS SHOULD GIVE ANY DEFERENCE TO UNPUBUBLISHED, POST-PROMULGATION AGENCY INTERPRETATIONS OF AGENCY RULES 19

IV. THIS COURT SHOULD HOLD THAT CONSTITUTIONAL FAIR NOTICE INCLUDES WITHIN ITSELF THE REQUIREMENT THAT ONCE FAIR NOTICE IS GIVEN TO A REGULATED ENTITY, THAT ENTITY MUST HAVE A REASONABLE AMOUNT OF TIME IN WHICH TO COMPLY WITH THE OBLIGATION THAT HAS BEEN NOTICED.. 24

CONCLUSION 27

APPENDICES

A. Decision of the Fourth Circuit 1a

B. Decision of the District Court 34a

C. Order Denying Petition for Rehearing 74a

D. Mandate of the Fourth Circuit 76a

TABLE OF CONTENTS—Continued

		Page
E.	Excerpts from §§ 112 and 301 of the Clean Air Act	77a
F.	Benzene NESHAP Rule and Preamble	85a
G.	Excerpts from 40 C.F.R. Part 61	156a
H.	Affidavit and Initial Report of E. Bruce Nauman	175a
I.	Report of James Wei	187a

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Alliance for Cannabis Therapeutics v. DEA, 115 F.3d 1131 (D.C. Cir. 1994) 25
Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104 (1st Cir. 1997) 12
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 11, 19, 20
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984) 12, 19, 21, 22
Clean Ocean Action v. York, 57 F.3d 328 (3d Cir. 1995) 18
Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976) 24
Ethyl Corp. v. EPA, 51 F.3d 1053 (D.C. Cir. 1995) 25
FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965) 21-22
First American Bank v. Dole, 763 F.2d 644 (4th Cir. 1985) 24
General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) 24
Hoechst Celanese Corp. v. U.S., 964 F. Supp. 967 (1996), *aff'd in part, rev'd in part*, 128 F.3d (1997) ..... *passim*
Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987) 13, 17
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 10, 21
Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144 (1991) 12, 18, 20
Ohio State Univ. v. Secretary, United States Dep't of Health and Human Services, 996 F.2d 122 (6th Cir. 1993), *cert. granted, vacated on other grounds*, 512 U.S. 1231 (1994) 12
Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3387 (1998) 13

TABLE OF AUTHORITIES—Continued

	Page
Rollins Environmental Services v. U.S. E.P.A., 937 F.2d 649 (D.C. Cir. 1991)	26
Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318 (D.C. Cir. 1990)	24
State of Vermont v. Thomas, 850 F.2d 99 (2d Cir. 1988)	23
Stinson v. United States, 508 U.S. 36 (1993)	12
Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994)	11, 20, 21
Udall v. Tallman, 380 U.S. 1 (1965)	7, 9, 11, 19, 20
FEDERAL STATUTES AND REGULATIONS	
Administrative Procedure Act, 5 U.S.C. § 551(4) (1994)	5, 23
Administrative Procedure Act, 5 U.S.C. § 552 (a)(1) (1994)	24
28 U.S.C. § 1254(1) (1994)	2
Clean Air Act § 112, 42 U.S.C. § 7412 (1988)	2, 6
Clean Air Act § 112, 42 U.S.C. § 7412 (1994)	2, 6
Clean Air Act § 301(a)(1) (1994)	17
Federal Register Act, 44 U.S.C. § 1507(4) (1994)	23
40 C.F.R. Part 61 (1997)	2
40 C.F.R. § 61.05 (1997)	2
40 C.F.R. § 61.355 (1997)	6
40 C.F.R. § 61.110(c) (1997)	2
40 C.F.R. § 61.342 (1991)	6
40 C.F.R. § 61.342(a) (1997)	4, 6
FEDERAL REGISTER	
52 Fed. Reg. 21157 (June 4, 1987)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. ———

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Hoechst Celanese Corporation (HCC), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-33a) is reported at 128 F.3d 216 (1997). The district court's decision (App. 34a-72a) is reported at 964 F. Supp. 967 (D.S.C. 1996).

JURISDICTION

The court of appeals' opinion and judgment were entered on October 27, 1997. App. 76a. A timely petition for rehearing and suggestion for rehearing en banc was denied by an order of the court of appeals entered

on December 23, 1997 (App. 74a-75a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves portions of Clean Air Act § 112 (App. 77a-84a)[1] and 40 C.F.R. Part 61 (App. 123a-124a).

STATEMENT OF THE CASE

This petition concerns the meaning of an exemption contained in a rule promulgated by the Administrator of the Environmental Protection Agency (EPA) on June 6, 1984, as part of benzene emission standards known as the National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene (the benzene NESHAP). App. 85a-155a. Because the standards called for covered sources to make many changes at their plant sites, those subject to the NESHAP could seek up to two years in which to meet the rule's requirements. App. 78a-79a; 83a; 156a.

The benzene NESHAP expressly exempts from coverage any equipment in benzene service that is located at a plant site designed to "use" up to 1,000 megagrams (1,000 metric tons) of benzene per year. 40 C.F.R. § 61.110(c) (1997), App. 123a-124a. In 1984, four of Petitioner's plants employed benzene in their processes, and Petitioner sought to find out whether or not its plants were exempt. To do that, Petitioner needed to determine what the exemption meant by "use" of benzene. At that time, Petitioner's four plants—including the Celriver Plant in South

---

[1] Those parts of § 112 at issue in this case were not changed in any meaningful way by the 1990 Amendments to the Clean Air Act; however, relevant portions of 112 were renumbered by the 1990 Amendments. Thus what was § 112(c)(1)(B) of the pre-1990 Clean Air Act (42 U.S.C. § 7412 (1988)) is § 112(f)(4) of the Act as amended in 1990. 42 U.S.C. § 7412 (1994). Both versions are in the appendix. App. 78a-79a; 83a.

Carolina—recycled benzene: that is, they used the same benzene over and over within internal plant processes.[2]

To determine the meaning of "use"—and thus to learn whether its four plants were exempt from the benzene standards—Petitioner looked to the words in the exemption, to the rule's preamble, and to other documents in the rulemaking record. All indicated that "use" meant the amount of benzene "consumed" or the amount of benzene "in inventory" at a plant site. See App. 50a-51a, 63a-64a. By either measure, Celriver—which annually consumed and had in inventory far less than 1,000 megagrams of benzene—was exempt. App. 42a.

Petitioner sought and received further confirmation of its reading of the rule when it questioned regulators with respect to two of its Texas plants: the Bishop Plant and the Pampa Plant, which then both recycled benzene in a manner comparable to Celriver. In both the Bishop and Pampa cases, state regulators and EPA Region 6 officials confirmed in writing to HCC that to determine the amount of benzene "used" at a plant site, one looked at either the amount of benzene consumed or kept in inventory at the site. Again, under either test, Celriver was exempt. *Id.*

In the years following these communications with HCC, EPA personnel continued to tell members of the regulated community that benzene "use" at a plant site was to be based on a single counting of the amount of benzene annually consumed or kept in inventory at a plant site. The record contains examples of how—between 1984 and 1990—EPA representatives (and state regulators acting as EPA's representatives) repeatedly told HCC and others that the term "use" in the exemption meant either the amount of benzene consumed or in inventory at a plant site. App. 62a, 65a.

But in the five years following promulgation of the 1984 benzene NESHAP, others within EPA began dis-

[2] Since then, Celriver—and Petitioner's Celco and Pampa Plants—have entirely ceased using benzene in their processes.

cussing—internally—an entirely different interpretation of the term "use." Secret EPA memoranda—brought to light during this litigation—showed that after the rule was published, EPA staffers resolved that "use," when applied to plant sites that recycled benzene, would be interpreted to mean the amount of benzene as counted over and over as it recirculated through the plant site. App. 30a-33a. By that approach, a source that had on site only one megagram of benzene which it recirculated 1,000 times would be deemed to have "used" 1,000 megagrams of benzene and would not be exempt. And with no rules or guidance to constrain them as to where or when to recount the recirculated benzene, EPA staffers further undercut the exemption by designating—on an ad hoc basis—multiple places inside a plant where the recirculated benzene would have to be counted. By counting recirculated benzene at multiple points within a plant, even one megagram of benzene could quickly multiply into millions of megagrams of benzene; and the exemption would be extinguished. App. 33a.

The staff's count-the-circulating benzene—or "multiple counting" [3]—approach gave EPA the absolute power to interpret the exemption out of existence at whim. To illustrate, here is how EPA's interpretation would work in determining the amount of oil "used" by an automobile engine that holds only six quarts of oil and that neither leaks any oil, burns up any oil, or otherwise consumes any oil. Though most people would say that the engine uses only six quarts of oil, under EPA's approach, the amount of oil the car used would be equal to six quarts

---

[3] The term "multiple counting" does not appear in the rulemaking record since such an approach was not contemplated when the rule was adopted. EPA itself coined the term "multiple counting" in a subsequent rulemaking on benzene waste operations. There, after considering comments from the public, EPA rejected any multiple counting approach and called for counting "benzene quantity in a waste stream . . . only once without *multiple counting* . . . ." 40 C.F.R. § 61.342(a) (1997) (emphasis added) (App. 173a).

times the number of times the six quarts circulate within the engine. If you counted the oil at only one point within the engine, the amount of oil "used" could reach hundreds of thousands of quarts a year. And if you counted the oil at two, four, or more counting points within the engine, then the oil used would be two, four, or more times greater —potentially amounting to millions or billions of quarts of oil used. Thus, at the whim of the person making the calculation, the engine could be found to be using vast amounts of oil each year even though the amount of oil actually in the engine was never more than six quarts. *See* App. 33a; 58a n.12.

Because EPA staff's multiple counting interpretation of the exemption was never published,[4] HCC did not learn of it until many years after the benzene NESHAP was promulgated. In August 1989—five years after the NESHAP went into effect—EPA's southeastern office, Region 4, told HCC of one version of a multiple counting interpretation, saying that under that interpretation, Celriver was not exempt from the benzene NESHAP.

At the time, HCC questioned how EPA could interpret the exemption as it did, particularly in light of the language of the 1984 rule, including preamble language which flatly contradicts any multiple counting approach. Significantly, there is not one example in the rulemaking record that discusses how to count circulating or recycling benzene. This omission is telling since agencies typically give examples—in the record—demonstrating what the regulated community is expected to do. But this rulemak-

---

[4] Indeed, the internal Agency memoranda that supposedly set out the multiple counting interpretaion have still not been published, even though the Administrative Procedure Act (APA) notice-and-comment rulemaking procedures apply to any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4) (1994).

ing record is silent with respect to measuring "use" by any method other than what is consumed or what is on hand.[5]

Despite its belief that Region 4's counterintuitive interpretation of the rule was *not* the interpretation of the rule intended by EPA's Administrator at the time he published the benzene NESHAP, HCC—after it learned of EPA staff's reading—agreed voluntarily for Celriver to meet the terms of the NESHAP as read by the Region 4 staff. In early 1990, HCC provided Region 4 with a comprehensive compliance schedule that called for HCC not only to meet but to exceed the terms of the NESHAP at Celriver and to do so within approximately two years. HCC's proposed time to comply was consistent with the Clean Air Act and with EPA's own rules, which said that affected sources could seek up to two years in which to meet the terms of the NESHAP.[6]

EPA voiced no disapproval of HCC's proposed compliance schedule. And HCC met that proposed schedule: by September 1991, Celriver had actually exceeded the terms of the benzene NESHAP even as interpreted by EPA's staff. Nevertheless, EPA decided to sue HCC and to seek penalties from HCC for violating the rule. After

---

[5] The absence in the 1984 NESHAP of examples of how to count circulating benzene lies in sharp contrast to the examples that EPA included in its rulemaking on benzene waste operations. *Compare* 40 C.F.R. §§ 61.342 and 61.355 (1991), as adopted by EPA in 1990 (App. 157a-172a) *with* the current version of § 61.342(a), which was changed, following public comment, to make it clear that calculations were to be done "without multiple counting." App. 173a.

[6] The relevant portions of Clean Air Act § 112 (App. 78a-79a; 83a) and 40 C.F.R. § 61.05(c) (App. 156a) provide that the NESHAP rules "shall not apply" until 90 days after the rule's effective date and that EPA may grant a waiver giving affected sources up to two years in which to comply with the rules. Plants receiving waivers were not deemed to be in violation of the NESHAP after the 90th day. Rather, such plants were excused from having to comply during the period of the waiver.

four years of proceedings, the district court disposed of the liability phase of the case on cross-motions for summary judgment.

The district court acknowledged that from 1984 to 1990 EPA had interpreted the exemption many different ways. App. 62a. But, citing a long line of cases going back to *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (App. 38a), the district court ruled that it was compelled to defer to EPA's "present interpretation" of the rule. App. 38a-39a; 69a.

The district court, however, commented on all the evidence in the rulemaking record supporting Petitioner's reading of the rule and indicating that EPA representatives had previously interpreted the rule as Petitioner did. App. 50a-51a; 62a. Because of this, it ruled that HCC had not, in 1984, received constitutionally required fair notice of EPA's multiple counting reading of the rule and thus could not be found liable or penalized for having violated the rule when it was published. The district court then held that even if HCC received actual notice of a multiple counting interpretation later on, it should still not be held liable for violating the NESHAP because it was "undisputed" that Celriver had "acted responsibly to meet—and far exceed—the terms of the NESHAP" within the two-year period to which HCC would have been entitled had EPA given HCC fair notice of its regulatory obligations in June 1984. App. 69a-70a.[7]

Both sides appealed. The Fourth Circuit found record support for HCC's reading of the exemption (App. 15a), and it recognized that EPA had interpreted its rule inconsistently (App. 15a n.6). But, citing many of the deference cases relied upon by the district court (App. 7a),

---

[7] In reaching its decision, the district court considered that if HCC had received constitutionally adequate notice at the right time, it would have had the chance to seek—and in all likelihood to secure—a waiver giving it up to 24 months in which to come into compliance. App. 69a-70a.

the Fourth Circuit concluded that it was bound to defer to EPA's present interpretation of the rule so long as EPA's interpretation was not "nonsensical." App. 8a.

The Fourth Circuit then affirmed part of the district court's "fair notice" holding. It found that until August 1989, HCC had not received fair notice of EPA's reading of the rule and thus was not liable for failing to comply with the standards between 1984 and 1989. App. 16a-20a. But though the district court had concluded that HCC should not be penalized even if it did get actual notice of the interpretation in 1989, the Fourth Circuit concluded that HCC could be penalized beginning 90 days after that court said HCC had notice of EPA's reading of the rule. App. 26a. In other words, the Fourth Circuit held that from the moment in 1989 when it concluded HCC received actual notice of EPA's current interpretation, HCC had only 90 days in which to cure all deficiencies. On the ninety-first day and thereafter, the Fourth Circuit held that HCC could be subject to penalties to be determined by the district court. *Id.*

By holding HCC liable so soon after it said HCC had actual notice of EPA's interpretation, the Fourth Circuit has put HCC in a much worse position than it would have been in had EPA given HCC constitutionally adequate notice from the outset. That part of the appeals court's ruling thus takes away much of the force and effect of its lack-of-fair-notice ruling.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decision in this case raises several important principles: that agencies are required to use notice-and-comment rulemaking to develop sound regulations and to tell regulated entities what is expected of them; that courts have the power and the duty to say what the law is; and that fair notice must include within it a reasonable amount of time in which to comply once notice is given. Here, in accordance with its legal obliga-

tions, EPA put a regulation out for comment, made a record, provided examples of how the rule would work, and then put the rule into effect. But then, EPA staffers decided that they did not like what was written down. Instead of going through another round of rulemaking in order to change the rule, though, they proceeded to change the rule by re-interpreting it without the benefit of public notice and comment. That is the only explanation for how far fewer than 1,000 megagrams of benzene could suddenly come to be counted as many times more than the 1,000 megagram exemption threshold.[8]

When HCC asked the federal courts to e amine EPA's conduct, the courts replied that the Supreme Court of the United States required them to defer to an agency's interpretation of its own regulations. The Fourth Circuit has read the case law to say that a not "nonsensical" test can be used to examine an agency's interpretation of its rules.

Put into plain English, the Fourth Circuit's test for deference means no more than "was the agency's position not absurd or not ridiculous." Put more bluntly, the test is the "not stupid" test. But that is a far, far more minimal standard for deference than this Court expressed in *Udall v. Tallman* or elsewhere. And, as will be shown below,

---

[8] This is illustrative of what can happen when agencies are allowed to avoid statutory rulemaking safeguards. The regulation and the preamble provide an exemption that is illusory once the unpublished, post-promulgation reinterpretation is discovered and enforced. Moreover, EPA's attempt to change the meaning without going through rulemaking has put EPA in the position of enforcing an approach that—to our knowledge—EPA has consistently rejected as unsound whenever it has been considered in notice-and-comment rulemaking. *See supra* note 5 (EPA's benzene waste operation rules); 52 Fed. Reg. 21157 (June 4, 1987) (application instructions under the Emergency Planning and Community Right to Know Act specifically precluding multiple counting). *See also* App. 51a (describing EPA's rejection in another rulemaking of " 'processing rate,' a version of multiple counting," because it was "difficult to establish").

the Fourth Circuit is not the only court of appeals that has dropped the standard for deference below the floor. In order to get the federal courts back on track, this Court must make clear to them that they have no duty to yield to anything and everything that an agency conjures up just because the agency calls it an interpretation or just because what the agency says is not "nonsensical."

As things now stand—with federal courts thinking that they must defer to virtually everything an agency does—the federal courts have abdicated their power and duty to say what the law is. This leaves federal agencies with the authority both to make up law and then to interpret that "law" as they wish in individual cases.

This, though, stands on end the basic constitutional principle that, in the United States, it "is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). It is the courts that tell federal agencies whether they have stayed within the bounds of the law.

Though deference has its place among the tools that courts use to decide cases, if courts defer as a matter of course, they run the risk of letting an agency become the arbiter of what the law is. Deference can result in—and we believe in this case did result in—the impermissible promulgation and retroactive application of secret law with no real forum in which a regulated entity has a chance to correct the abuse.[9] This is certainly true if the test for whether deference is to be accorded is so minimal that all an agency has to do is present, during litigation, an interpretation that is "not absurd," "not ridiculous," "not stupid."

---

[9] In an enforcement context, agency enforcement personnel can give "inconvenient" regulatory language a "creative" reading to serve the immediate needs of the litigation, and they can then try to legitimize such a reading by calling it an "interpretation."

Such a weak standard for deference opens the door for an agency to operate without regard to law. Such a weak standard is an invitation for agencies to be corrupted by heady power. The Court should step in to correct this spreading misunderstanding of the deference standard.

I. THIS COURT SHOULD MAKE CLEAR TO THE FEDERAL COURTS THAT *UDALL v. TALLMAN* DEFERENCE DOES NOT MEAN THAT THE COURTS MUST DEFER TO AGENCY INTERPRETATIONS OF REGULATIONS IN VIRTUALLY ALL CASES.

A. The Fourth Circuit and Other Circuits Have Deviated from This Court's Basic Deference Principles.

Federal regulatory law can be complex but—complex or not—the goal of regulatory law is that those doing the regulating speak clearly and say plainly that which they mean to say so that those who are being regulated will know what is required of them. But disputes can arise even with respect to comprehensive, well-written regulations.

In the search for an approach to resolving disputes between regulators and those regulated, this Court decided to give some effect—to defer, in certain circumstances—to agency interpretations of the laws under which they operated and to agency rules and regulations adopted after notice-and-comment rulemakings. But this Court did not say that deference knows no bounds. Rather it said that courts are to defer to agency interpretations only so long as those interpretations are not "plainly erroneous" or "inconsistent" with the underlying rule. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965), *quoting Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (An "agency's interpretation of its own regulations . . . must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must

give substantial deference to an agency's interpretation of its own regulations."); *Stinson v. United States*, 508 U.S. 36, 45 (1993); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 150-151 (1991). *Cf. Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

Though this Court never indicated that deference was intended to turn the federal courts into rubber stamps for any agency conduct, the federal courts have, over the years, misread the deference cases as imposing upon them the most minimalist of standards when reviewing agency conduct. In this case, the Fourth Circuit has used a not "nonsensical" standard.[10] In a similar vein, the First Circuit has applied a not "mindless, or whimsical" standard. *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 110 (1st Cir. 1997). And the Sixth Circuit has "thrown up its hands" and decried the way in which the deference standard has softened into a virtual legal "quicksand": "The standard has been constantly shifting, steadily sinking, and, from the perspective of the intermediate appellate courts, frustrating." *Ohio State Univ. v. Secretary, United States Dep't of Health and Human Services*, 996 F.2d 122, 123 (6th Cir. 1993), *cert. granted, vacated on other grounds*, 512 U.S. 1231 (1994).

Petitioner submits that the deference standard has become unhinged from its underpinnings. Though it began life as a tool to help courts to evaluate agency rules, it has evolved—indeed transmuted—into an excuse for the

---

[10] The Fourth Circuit also said it upheld EPA's multiple counting interpretation because such an interpretation "harmonizes" with the purposes of the Clean Air Act. App. 8a. This misses the point. Of course EPA has the authority to adopt an exemption based on multiple counting, but to do so it must first propose and seek comment on such a rule. EPA did not do that here.

courts to accept any agency interpretations that are not ridiculous.[11]

B. The Agencies—Having Learned That Their Power Has Virtually No Court-Imposed Limits—Have Responded By Running Roughshod Over Both the Statutes Constraining Their Behavior and the Regugated Community.

The fact that the courts defer to agencies almost as a matter of course has not been lost on the agencies. Knowing that they can act almost with impunity, agencies have taken advantage of the situation by first adopting rules that say one thing and then, over time, interpreting them to mean something entirely different. As one court describes it, this allows agencies to take "one view one year and another the next"—all without giving any notice to the public and without following APA and other statutory notice-and-comment procedures for changing agency rules. *See Homemakers*, 832 F.2d at 412.

Another consequence of such wholesale deference is that some agencies have stopped trying to write clear rules in the first instance. Instead, they write "mush" and then give that "mush . . . concrete form only through subsequent, less formal interpretations." *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 584 (D.C. Cir. 1997), *cert. denied*, 66 U.S.L.W. 3387 (1998).

This increasing agency audacity—coupled with the deference being paid by the courts to virtually anything an administrative agency says—leaves the regulated community in a perilous situation. While regulated entities try their best to comply with the law, they find themselves

---

[11] Though courts have said they will not defer to all agency interpretations, the actual practice of reviewing courts has been to defer to agency interpretations of their own rules "in all but extraordinary cases." *See, e.g., Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987), *citing Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

not being able to get a fix on what the law is.[12] They are subject to the vagaries of shifting agency interpretations, plagued by secret law. They cannot trust the words of a regulation and the illustrative examples used. The rulemaking record serves as no constraint on agency caprice because agencies can—as EPA did here—simply change the law whenever agency staffers change their minds about what they wish the law to be. Even letters or comments from federal and state regulators do not rein in the agency because those representations can be shunted aside. Order needs to be brought back to this situation.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR REASSERTING THE PROPER RULES GOVERNING JUDICIAL DEFERENCE TO AGENCY INTERPRETATIONS.

In this case, EPA's Administrator wrote one thing in the 1984 benzene NESHAP and EPA's staff tried to change what the Administrator had written. Here, the staff's internal actions—aimed at avoiding notice-and-comment rulemaking—were exposed through internal EPA memoranda that came to light only because of this litigation. This case puts on display the dangers of federal agencies acting as if they need not answer to anyone, not even to the courts. On this record, the Court will be able to see what EPA published, then measure whether EPA's "present interpretation" reasonably relates to what the public was told. With this case, this Court can replace the limits on deference that have been lost by the lower federal courts.

---

[12] Regulated entities wanting to comply with environmental requirements can be stymied if they do not know what they are supposed to do because EPA fails to follow the rulemaking procedures designed to tell them what is expected of them. Judicial deference to agency interpretations in these circumstances encourages EPA to continue to "hide the ball," thus hindering timely compliance efforts and—in turn—interfering with the prompt accomplishment of environmental goals.

A. This Court Should Make Clear That It Is Not Appropriate For Federal Courts to Defer to Agency Interpretations That Defy the Very Language of a Published Rule.

If words in a rule mean what they normally mean, then companies can learn what the rule means—they get notice of what they must do—just by reading it. In this case, both the district court and the appeals court found that HCC's single counting interpretation was a reasonable way to interpret the term "use" in the exemption. Indeed, one of the reviewing judges stated explicitly that the most commonplace and natural reading of the rule's language is that "use" is a single counting concept: it equals the amount of benzene in use and consumed at a plant site during a year. App. 29a. And all the reviewing judges determined that EPA's interpretation of the term "use" was so abnormal that HCC did not get fair notice of that interpretation from the plain language of the rule.

Nonetheless, all the reviewing judges—even the judge who said he believed that EPA's interpretation defied the plain language of the exemption—still felt compelled to defer to the agency's multiple counting interpretation. Such is the strength of the belief among federal judges that they have no choice but to defer to all but the most ridiculous agency interpretations.[13] The Court must correct that misimpression.

---

[13] The courts here not only ignored the normal meaning of the words in the rule, but also they ignored *unrebutted* expert testimony about the plain meaning of technical terms in the record describing the rule. Specifically, the courts deferred to EPA's interpretation of enginering terms like "throughput" and "mass balance," even though that required them to ignore those terms' established technical meanings. According to the unrebutted expert testimony of chemical engineers—Dr. James Wei, Dean of the School of Enginering and Applied Sciences at Princeton University and Dr. E. Bruce Nauman, full professor of chemical engineering at Rensselaer Polytechnic Institute—those engineering terms, when applied to a

B. This Court Should Not Allow the Federal Courts to Defer to Latter Day Agency Interpretations that Contradict Agency Explanations Made When the Rule Was Promulgated.

The rulemaking record also contains several examples which show that EPA's Administrator intended "use" in the exemption to mean the amount of benzene "consumed" or "on hand." In one example, the Administrator's statements in the rule's preamble—published as part of the 1984 final rule—definitively equated the concept of "use" in the exemption with "consume." [14] Thus, the most authoritative contemporaneous statements of the Agency's intent support and compel reading the exemption in the way that HCC has read the exemption from the beginning, and they flatly contradict the regulatory interpretation that EPA has advanced in this litigation.

By contrast, EPA could not point to one place in the rulemaking record that contains an example of how to count benzene as it circulates through a plant site. The primary basis for EPA's multiple counting approach was internal memoranda that were written by EPA staff *after* the rule was published and were never subjected to the scrutiny of notice-and-comment rulemaking. App. 11a-12a. Such material is not entitled to deference. The very purpose of notice-and-comment rulemaking is eliminated when an agency can successfully advance post-rulemaking

---

plant site as a whole (as called for by the benzene NESHAP exemption), refer to a plant's overall net production or consumption, which are single counting concepts. App. 175a-191a; *see* 47a.

[14] The Administrator explained that the exemption was meant to address the concerns of an unidentified pharmaceutical industry source which was known to recycle benzene in a process that "*consumed* about 325 MG/year [of benzene] during 1981." App. 113a. The Administrator went on to state that, under the terms of the exemption as originally adopted, the possibility that such pharmaceutical operations "could be adversely affected is very small" because "most pharmaceutical plants *use* very little benzene." *Id.* at 113a-114a (emphasis added). *See also* App. 29a-30a.

interpretations that contradict what is in the rulemaking record.

C. The Federal Courts Should Not Defer to the Latest in a Series of Agency Interpretations.

It is not appropriate to defer to an agency interpretation which is but one of several from the agency because when "an agency waffles without explanation, taking one view one year and another the next," this may show that there has been no real decision made by the agency. *Homemakers*, 832 F.2d at 412. Thus when courts face waffling agencies, courts should be "less willing to accept the agency's latest word as authoritative . . . ." *Id.* The latest in a string of vacillations may be no better or no more enduring than a preceding position. In addition, an about-face by an agency may be a telltale sign of an effort either to defy the outcome or to avoid the requirements of notice-and-comment rulemaking. *Id.* To defer to "here today gone tomorrow" interpretations on the part of agencies encourages misconduct by the agencies; it allows them to avoid making up their minds and to play a game of "bait and switch" with the regulated community.[15]

The need to prevent agency staffers from re-writing rules is particularly acute in the case of regulations promulgated under the Clean Air Act. This is so because the Clean Air Act—distinct from other major federal environmental statutes—places the power to make regulations solely in the hands of EPA's Administrator *and expressly prohibits the Administrator from delegating that power.*[16]

---

[15] That is what happened here: certain aspects of EPA's multiple counting approach were presented, for the first time, in the government's briefs in support of its summary judgment motion in the district court. *See* App. 41a.

[16] *See* Clean Air Act § 301(a)(1) ("The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, *except the making of regulations*, subject to section 7607(d) of this title,

Consequently, none of the various EPA regional offices can speak with authority as to what a particular regulation means, and the statements of the Administrator take on added significance.[17]

In this case, the Fourth Circuit deferred to an EPA Region 4 interpretation that materially conflicted with the statements made by EPA's Administrator when the rule was published. Moreover, Region 4's interpretation conflicted with statements made by another EPA region in the years following the rulemaking. Region 4's interpretation thus could not be taken as the "authoritative" EPA interpretation of the rule. And only the authoritative agency interpretation could ever be properly accorded deference.

The courts should not be left to think that they must give in to such interpretations. If the courts are left with that impression, the administration of justice will suffer; the role of statutorily mandated notice-and-comment rulemaking will be further eroded; the agencies will become convinced that they are free to chase the regulated community helter-skelter with interpretations *du jour*. The agencies need to be reminded that, "[o]nce a legislative rule . . . is adopted, its substantive provisions may be changed only by compliance with the notice and hearing requirements of the Administrative Procedure Act." *Clean Ocean Action v. York*, 57 F.3d 328, 333 (3d Cir. 1995).

---

as he may deem necessary or expedient.") (emphasis added). App. 84a.

[17] The appeals court cited the Supreme Court for the proposition that the "power authoritatively to interpret its own regulations is a component of the agency's delegated law-making powers." App. 7a, *quoting Martin v. OSHRC*, 499 U.S. at 151 (1991). This misses the point that where, as with the Clean Air Act, Congress has placed an agency's "delegated lawmaking powers" exclusively in the hands of that agency's Administrator, then *only* the Administrator can exercise the "power authoritatively to interpret" a rule promulgated under the Act.

III. IN ADDITION, THIS CASE PROVIDES AN APPROPRIATE VEHICLE FOR CONSIDERING WHETHER THE FEDERAL COURTS SHOULD GIVE ANY DEFERENCE TO UNPUBLISHED, POST-PROMULGATION AGENCY INTERPRETATIONS OF AGENCY RULES.

As we have discussed above, the once salutary idea of deferring to agency interpretations of their rules has broken down in the real world of courts and business and administrative regulation. Deference has become a shield behind which agencies are hiding laws made by whim rather than through rulemaking. As deference has left its *Udall v. Tallman* underpinnings and changed into what it has become today, agencies like EPA have forgotten that a "substantive regulation must have sufficient content and definitiveness as to be a meaningful exercise in agency lawmaking" and that it is not "open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" *Paralyzed Veterans,* 117 F.3d at 584.

Deference has gotten out of hand, and HCC submits that this Court may want to consider doing away with deference altogether, especially where deference is being given to unpublished, post-promulgation agency interpretations. Although the rationale for giving deference to an agency's interpretation of a *statute* it is charged with implementing has been clearly expressed (see *Chevron,* 467 U.S. at 844), that rationale does *not* apply when the interpretation at issue is an agency's interpretation of a *rule* that the agency itself has devised and promulgated and which may not become public until years after promulgation, often in enforcement proceedings. In HCC's view, the application of the deference standard to cases involving an agency's interpretation of its own rules has never been adequately justified.

In *Seminole Rock*—perhaps the earliest expression of this aspect of the "deference" concept—the Court ob-

served that a reviewing court "must *necessarily* look to the administrative construction of the regulation if the meaning of the words used is in doubt." 325 U.S. at 413-14 (emphasis added). But the Court did not explain why it was "necessary" for the reviewing court to look to the agency's interpretation rather than determine the meaning of the regulation itself, nor did the Court cite any prior decision or other authority for the proposition.

Facing the issue twenty years later in *Udall v. Tallman*, the Court—invoking *Seminole Rock*—asserted that "[w]hen the construction of an administrative regulation rather than a statute is in issue," deference to the agency's interpretation "*is even more clearly in order.*" 380 U.S. at 16 (emphasis added). But again, the Court provided no explanation for why deference was "even more clearly in order" in the case of a regulation as opposed to a statute.

More recently, the Court has attempted to provide some rationale for its deference-to-agency-constructions-of-their-own-rules concept. For instance, in *Martin v. OSHRC*, the Court stated that "[b]ecause applying an agency's regulations to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives," the Court "presume[s] that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." 499 U.S. at 151, *citing Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980).[18] The Court developed

[18] Broad deference is "all the more warranted," the Court has asserted, when the regulation "concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 512, *citing Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). Yet, the relevant question is not who is best positioned to apply a regulation to a "complex" technical situation, but rather, which govern-

this delegation thought in *Chevron*, where the Court suggested that an agency may be deemed to have been delegated the authority to write rules that fill gaps left by Congress.[19]

But where Congress has left a "gap" for an agency to fill, the agency should be required to fill that "gap" through rulemaking that establishes clear and definitive regulatory language. The "very purpose behind the delegation of lawmaking power to administrative agencies" is to " 'resolve . . . ambiguity in a statutory text.' " *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting), *citing Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Agencies should not be permitted "merely [to] replace[] statutory ambiguity with regulatory ambiguity." *Id.*

It therefore follows from *Chevron* that an agency's chance to exercise its "expertise" and "policymaking prerogatives" comes *only* at the time the agency writes its regulations. But once those regulations have been promulgated, the question of what they mean is a pure question of law that only a court should be allowed to decide. This has been so since the beginning of the Republic: "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also FTC v.*

---

mental entity under our constitutional system is ultimately entitled to establish the meaning of laws, including regulations.

[19] The deference afforded agencies under *Chevron*'s second prong is grounded in the principle that, in those situations where Congress has not "unambiguously expressed" its "intent" as to the meaning of a statutory provision, there has been either an explicit or implicit delegation of authority by Congress to the implementing agency to resolve the matter. The " 'power of an administrative agency to administer a congressionally created . . . program,' . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843, *citing Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Colgate-Palmolive Co., 380 U.S. 374, 385 (1965) (While an "informed judicial determination is dependent upon enlightenment gained from administrative expertise," in the "last analysis the words [of a statute] set forth a legal standard and they must get their final meaning from judicial construction."). Thus, the principle is well established that "[t]he judiciary is the final authority on issues of statutory construction." *Chevron*, 467 U.S. at 843 n.9.

To follow *Chevron's* logic to its conclusion is to see that deference is not appropriate where an agency's post-promulgation interpretation of a *regulation* is concerned. Regulations are laws just as statutes are laws. Like statutes, regulations dictate behavior by those to whom they apply. Like statutes, regulations drive the expenditure of time, of money, of peace of mind on the part of those who are being regulated. Like statutes, if regulations are violated, enforcement proceedings, stop-sale orders, civil penalties, and perhaps even criminal sanctions may follow.

The responsibility for determining the meaning of regulations must rest ultimately not with any element of the executive branch that promulgated them, but with the judiciary. With all due respect, HCC submits that the prospect that EPA should be able to read a rule any way EPA pleases so long as that reading is not "nonsensical" should ring alarm bells in the judiciary, alerting the courts to the very real risk that EPA has gotten "bigger than the law."

Accordingly, to address situations where an agency advocates, during litigation, a regulatory interpretation that differs from the one it presented to the public at the time of rulemaking or where an agency promulgates an ambiguous rule and later (without further rulemaking) reads it to allow only one of several plausible interpretations, HCC respectfully suggests that the Court use this case explicitly to abandon the "deference" principle and direct the reviewing court to determine the single correct

meaning of the provision. That is, if the reviewing court —applying traditional tools of regulatory construction [20]— finds that the agency has indeed advanced the best interpretation of the regulation as promulgated, then that interpretation should be upheld. Otherwise, it should be rejected.

In the instant case, both the district court and the court of appeals upheld EPA's "multiple counting" interpretation of the benzene NESHAP exemption provision on the grounds that HCC had not shown that multiple counting was a "plainly erroneous" reading of the regulatory language. At the same time, both courts found that HCC's single counting interpretation was a reasonable way to construe the exemption. In such circumstances, the courts should have resolved the matter not by simply determining whether "multiple counting" is one of several not "nonsensical" ways to read the exemption, but, rather, by ascertaining whether or not "multiple counting" *is* indeed what the exemption as promulgated means.

In sum, deferring to an agency's interpretation of its own ambiguous regulation does not vindicate any constitutional separation of powers principle or give effect to the agency's supposed expertise in a complex technical field. Rather, it rewards the agency for having failed to meet its obligation to resolve statutory ambiguity through rulemaking. Deference in this context is a perversion of fundamental principles of administrative law. It is an

---

[20] Use of traditional tools of regulatory construction would include evaluation of the regulatory language in light of the explanation of the rule in the contemporaneous preamble to the rule published in the *Federal Register*. The preamble to an EPA rule provides singularly authoritative evidence of the agency's intent. *See State of Vermont v. Thomas*, 850 F.2d 99, 103 (2d Cir. 1988). Indeed, the preamble is part of an agency rule. *See* 5 U.S.C. § 551(4) (1994) (definition of "rule" in the APA); 44 U.S.C. § 1507(4) (1994) (Federal Register Act provides that content of the *Federal Register* "shall be judicially noticed.").

abdication of judicial responsibility that this Court should restore.

IV. THIS COURT SHOULD HOLD THAT CONSTITUTIONAL FAIR NOTICE INCLUDES WITHIN ITSELF THE REQUIREMENT THAT ONCE FAIR NOTICE IS GIVEN TO A REGULATED ENTITY, THAT ENTITY MUST HAVE A REASONABLE AMOUNT OF TIME IN WHICH TO COMPLY WITH THE OBLIGATION THAT HAS BEEN NOTICED

In *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995), the court gave voice to the principle that due process requires that a regulated entity have fair notice of what it is supposed to do before it can be penalized for not doing it. Other circuits have voiced similar concepts. *See Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976); *First American Bank v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985).

The Court should use this case to make clear that the "fair notice" concept established in the *General Electric* line of cases must also necessarily encompass the notion of "timely notice"—*i.e.*, that after an entity is given notice of a regulatory obligation, it must be given a reasonable amount of time in which to meet that obligation without being penalized for getting the late notice. This aspect of the fair notice concept is codified in the notice requirements of the APA. *See, e.g., Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 327 (D.C. Cir. 1990). Among other things, the APA says this: "[e]xcept to the extent that a person has *actual and timely notice* of the terms thereof," a person may not in any way be "adversely affected by" any matter—such as an agency interpretation—that is required to be published in the *Federal Register* and not so published. *See* 5 U.S.C. § 552(a)(1) (1994) (emphasis added).

Courts which have analyzed the APA's requirement of "actual and timely notice" have concluded that a regulated entity must be given sufficient time to bring its con-

duct into conformity with the obligations of which it has been put on notice. *See Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1136 (D.C. Cir. 1994), *quoting Northern California Power Agency v. Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1976). In other words, a regulated entity that establishes that it did not originally receive fair notice must—after finally getting notice—be given sufficient opportunity and time in which to comply with the rule.

The district court's decision in this case is consistent with the foregoing principles, but the Fourth Circuit's is not. The district court concluded that the Clean Air Act and EPA's rules contemplate that those who get notice at the time of promulgation that they are subject to a NESHAP provision could seek up to two years in which to comply with that provision. Therefore, it made good sense for the district court to hold, as it did, that HCC was *not* liable for having violated the benzene NESHAP because Celriver had "acted responsibly to meet—and far exceed—the terms of the NESHAP" within the two-year compliance time-frame to which HCC would have been entitled had EPA given HCC fair notice of its regulatory obligations in June 1984. App. 65a-71a.

The Fourth Circuit, however, did not look back in time to consider the posture HCC would have been in had HCC received fair notice from the beginning. It did not consider that a company that got fair notice from the start (in June 1984) was virtually assured of having 730 days in which to come into compliance.[21] Rather, the Fourth Circuit held that after HCC received actual notice that

---

[21] Notwithstanding Congress' statement that EPA "may" grant the waiver, EPA has no discretion to exercise; it *must* grant a waiver when a source makes a showing that satisfies the statutory test. *See, e.g., Ethyl Corp. v. EPA*, 51 F.3d 1053, 1058-59, n.7 (D.C. Cir. 1995). Since HCC could make the statutory showing for its similarly situated Pampa Plant (App. 50a; 56a-57a), it is reasonable to assume that HCC could have made the showing—and received a waiver—at Celriver.

its Celriver Plant was not exempt, HCC had only 90 days in which to meet the terms of the standards at Celriver. And on the 91st day, HCC was liable for Celriver's failure to meet the standards. App. 26a. According to the Fourth Circuit, all HCC's efforts to meet the standards promptly upon being told it was subject to them are irrelevant to whether it is "liable"; such efforts—says the Fourth Circuit—can be taken into account only in a subsequent penalty phase of the litigation.

This "remedy" is not adequate. Even if HCC can, in further proceedings, establish that no monetary penalty is warranted for its 1989-1991 actions (and HCC believes it can), a "violation found is still a significant penalty." *Rollins Environmental Services v. U.S. E.P.A.*, 937 F.2d 649, 654 n.2 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part). Not only has HCC here been "labeled a 'law breaker,' but this violation can be used against the company in assessing penalties with respect to any future violations." *Id.* In addition, the 4th Circuit's decision forces HCC to incur the potentially substantial costs of the other proceedings that would need to take place before the district court could decide that no monetary penalty is warranted.

Petitioner prays that the Court use this case to make clear that the "fair notice" component of due process means not only that a regulated entity must have actual notice of a rule's meaning, but also that it must not be penalized for getting notice later than it should have gotten the notice. Regulated entities put in the position of HCC—sources that are not timely told of their regulatory obligations—are entitled to avoid the stigma of "lawbreaker." Fair notice requires no less.

CONCLUSION

Important principles of the way administrative agencies do business are on the line here. So too are important principles of justice and fairness. Agencies must know that they are not above the law and that they cannot make law in internal memos and then impose it upon the regulated community through post-hoc re-interpretations that fly in the face of the published statements of the agencies. But more than that, the federal courts need to be reminded that *they* say what the law is in our country, that *they* decide whether the law has been complied with. These are important principles that the Court ought to address in this case.

Wherefore, HCC prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

ANDREA BEAR FIELD
MAIDA O. LERNER
DAVID S. HARLOW
LEE A. CASEY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

DOUGLAS W. DAVIS
JOHN CHARLES THOMAS
CYNTHIA S. CECIL
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

March 23, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2003

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

HOECHST CELANESE CORPORATION,
Defendant-Appellee.

CHEMICAL MANUFACTURER'S ASSOCIATION; CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL; NATIONAL ASSOCIATION OF MANUFACTURERS; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; SCIENCE & ENVIRONMENTAL POLICY PROJECT; TEXAS INSTITUTE FOR ADVANCEMENT OF CHEMICAL TECHNOLOGY INCORPORATED; NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS; TEXAS NATURAL RESOURCE CONSERVATION COMMISSION (TNRCC),

Amici Curiae.

No. 96-2051

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HOECHST CELANESE CORPORATION,
Defendant-Appellant.

CHEMICAL MANUFACTURER'S ASSOCIATION; CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL; NATIONAL ASSOCIATION OF MANUFACTURERS; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; SCIENCE & ENVIRONMENTAL POLICY PROJECT; TEXAS INSTITUTE FOR ADVANCEMENT OF CHEMICAL TECHNOLOGY INCORPORATED; NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS; TEXAS NATURAL RESOURCE CONSERVATION COMMISSION (TNRCC),

Amici Curiae.

Appeals from the United States District Court
for the District of South Carolina, at Rock Hill.
Joseph F. Anderson, Jr., District Judge.
(CA-92-1879-0-17)

Argued: May 5, 1997
Decided: October 27, 1997

Before NIEMEYER and MOTZ, Circuit Judges, and
STAMP, Chief United States District Judge for the
Northern District of West Virginia, sitting by designation.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

In 1984, pursuant to its authority under the Clean Air Act, the Environmental Protection Agency (EPA) promulgated regulations governing fugitive emissions of benzene, a carcinogenic pollutant posing significant risk to human health. This case involves the proper interpretation of those regulations, which impose numerous preven-

tative and reporting requirements on industrial plants emitting benzene, but exempt plants designed to use less than 1,000 megagrams of benzene a year from these requirements. The issue here is whether a plant owned by Hoechst Celanese Corporation (HCC) is exempted from the requirements of the regulations. If not, that plant (one of the largest sources of fugitive benzene emissions in the United States from 1987 through 1993) indisputably violated the regulations in numerous respects.

The district court sustained EPA's interpretation of its own regulations, an interpretation that did not exempt the HCC plant. *United States v. Hoechst Celanese Corp.*, 964 F. Supp. 967, 971-76 (D.S.C. 1996). Nevertheless, because the court concluded that the EPA did not provide HCC with "fair notice" of EPA's interpretation, the court declined to find HCC liable for any regulatory violations. *Id.* at 979-986. Both EPA and HCC appeal. In most respects, we affirm the judgment of the district court. That court correctly concluded that EPA's interpretation of its own regulations is entitled to deference. The district court also correctly held that EPA did not initially afford HCC fair notice of that interpretation and so the company cannot be held liable for violations of the regulations during the period (1984 to 1989) when it lacked fair notice. However, the court erred in concluding that HCC could rely on a fair notice defense for violations that occurred after 1989—when EPA provided the company with actual notice of EPA's interpretation of the regulations. Accordingly, we reverse the judgment of the district court in this single respect and remand the case for further proceedings consistent with this opinion.

I.

The United States, on behalf of EPA, initiated this action against HCC for alleged violations of the National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene (NESHAP or regulations), 40 C.F.R. pt. 61, subpts. A, J, and V (1996), at HCC's

Celriver plant in Rock Hill, South Carolina. The NESHAP provides controls on the amount of benzene that can be emitted into the atmosphere. EPA propounded these controls because it concluded that they could substantially "reduce the estimated annual incidence of leukemia" for persons living within 20 kilometers of plants with equipment that leaked benzene—roughly twenty to thirty million people. NESHAP preamble, 49 Fed. Reg. 23, 498, 23,501 (1984). Specifically, the NESHAP requires industrial plants that are designed to produce, use, or otherwise have in service benzene to monitor equipment regularly for leaks, repair leaks promptly, and install equipment that prevents, captures, or destroys benzene emissions. The regulations include reporting and recordkeeping requirements and provide that violations are to be punished by civil penalties.

The regulations, however, exempt "[a]ny equipment in benzene service that is located at a plant site designed to produce or *use* less than 1,000 megagrams of benzene per year." 40 C.F.R. § 61.110(c)(2) (1996) (emphasis added).[1] The exemption reflects EPA's conclusion that the benefit achieved by regulating small volume users of benzene does not justify the cost involved. *See* NESHAP preamble, 49 Fed. Reg. at 23,510. The question that divides the parties is what does "use" mean in the exemption.

The EPA defines "use" broadly to mean utilization, employment, or putting in place; this definition includes but is not limited to "consumption" of benzene, i.e., the overall amount needed to keep processes operational. The Celriver plant was designed to utilize benzene as a "quench" to cool hot ketene gases and as a "reflux agent" to help separate water and other compounds from acetic anhydride and acetic acid; after each of these uses the benzene was cooled, purified, and then recirculated as a "quench" or "reflux agent." Under EPA's definition of

[1] One megagram is equivalent to approximately 2,200 pounds.

"use," counting each time benzene circulated through pipes and valves capable of leaking, the Celriver plant was designed to "use" more than a million megagrams of benzene a year, and was not exempt from the NESHAP. Indeed, the Celriver plant not only "used" vast amounts of benzene, it also leaked substantial amounts of the carcinogen: as the district court noted, "the Celriver plant ranked in the top 5% of all plants reporting benzene fugitive emissions in every year between 1987 and 1993." *Hoechst Celanese*, 964 F. Supp. at 974.

Nevertheless, HCC claims the Celriver plant was exempt from the NESHAP. The company asserts that "use" in the exemption has only a single narrow meaning—"consumption." Since the Celriver plant continually recycled benzene, the total quantity it "used," under the company's theory, never exceeded 1,000 megagrams a year and thus the plant qualified for the exemption under 40 C.F.R. § 61.110(c)(2). The company concluded that the exemption was self-executing and for this reason HCC neither filed reports for the Celriver plant nor complied with any of the monitoring or other requirements of the regulations.

Because HCC never applied for an exemption for the Celriver plant or filed any reports as to its benzene usage, EPA did not become aware of the possibility of substantial benzene emissions at the Celriver plant until 1989. At that time, EPA's Region 4 office, which exercised enforcement authority over plants located in South Carolina, expressly notified the company in writing that if "benzene is recycled or reused in any process . . . the total cumulative flow through the process rather than net benzene consumption or usage" is to be counted as "use" of benzene for purposes of the regulations. After further communications between the parties, EPA determined that the Celriver plant had violated the NESHAP and so initiated this action.

EPA alleged that HCC, at its Celriver plant, violated NESHAP leak detection and repair requirements as well as requirements related to the installation of control devices, reporting, and recordkeeping. EPA asserted the Celriver plant did not qualify for the exemption and, even if it did, HCC could not claim this protection because it never applied to EPA for the exemption. In response, HCC argued that EPA's interpretation of the exemption was erroneous and merited no deference. Alternatively, HCC contended that if EPA's interpretation were accepted, HCC should not be held responsible for any violations of the regulations because it lacked fair notice of that interpretation. On cross-motions for summary judgment, the district court sustained EPA's interpretation of the regulations, but concluded that HCC lacked fair notice of this interpretation both before and after EPA's direct contacts with HCC in 1989. The court therefore refused to find HCC liable for any violations of the regulations.

II.

The Clean Air Act unquestionably provides EPA with broad powers to promulgate regulations necessary to identify and control hazardous air pollutants. *See* 42 U.S.C.A. §§ 7401-7671q (West 1995 & Supp. 1997). HCC makes no claim that the benzene regulations in any way violate or are contrary to EPA's statutory authority. *Cf. Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) (rejecting appellant's contentions that agency's interpretation conflicts with language and legislative history of statute). Nor does the company assert that either the Clean Air Act or the NESHAP contravenes any constitutional provision. Finally, HCC does not contend that EPA's procedures in promulgating the regulations were flawed. Thus, the initial question before us is simply whether EPA's interpretation of its own authorized, and properly promulgated, regulations should be accorded deference.

The Superme Court has continually reaffirmed that an agency's interpretation of its own regulations is entitled

to substantial deference. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."); *Stinson v. United States*, 508 U.S. 36, 45 (1993) ("[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation."). When an agency applies its "regulation to complex or changing circumstances," the Court has explained, this "calls upon the agency's unique expertise and policy-making prerogatives" and courts must "presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. OSHRC*, 499 U.S. 144, 151 (1991).

At least implicitly, HCC acknowledges that generally EPA's interpretation of property promulgated, statutorily authorized, regulations is entitled to deference. HCC contends, however, that "[t]his is not a deference case." Brief of Appellee at 22. The company asserts that the plain language of the NESHAP does not permit EPA's interpretation. It further argues that EPA's interpretation merits no deference because the agency assertedly did not espouse its present interpretation when it originally promulgated the regulations, but only "created" that interpretation "during this litigation."

A.

In resolving this question, we begin with the plain language of the regulations. The NESHAP itself does not indicate any intent to limit the meaning of the term "use" to consumption. Indeed, EPA's decision to give "use" a more expansive treatment than that advocated by HCC is consistent with the ordinary meaning of "use." *See Black's Law Dictionary* 1541 (6th ed. 1990) (defining "use" to include "to make use of, to employ" as well as "to put into action or service, to utilize").

Nor is the agency's broad interpretation nonsensical. After all, recycled benzene is just as likely to create a health threat as new benzene; each time benzene passes through a valve or pipe, it can potentially leak. Regulations designed to reduce the risk posed by this carcinogen should logically treat new and recycled benzene alike. Thus, EPA's interpretation of its own regulatory exemption harmonizes with the purpose of the authorizing statute, the Clean Air Act: "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C.A. § 7401(b)(1) (West 1995). Congress mandated that EPA set emission standards that promote the public health and welfare with "the maximum degree in reduction in emissions of the hazardous air pollutants" subject to the Act, including cancer-causing benzene. 42 U.S.C.A. § 7412(d)(2) (West 1995). A broad reading of "use" certainly best achieves this goal.

Moreover, EPA's interpretation of its exemption accords with the purpose of the exemption itself. As the preamble to the regulations notes, the exemption was designed as a "small plant exemption" intended to exclude "most research facilities, pilot plants, and intermittent users of benzene." 49 Fed. Reg. at 23,510. EPA drafted the exemption in response to comments that the proposed NESHAP (which contained no exemption) was not cost effective for small plants, explaining:

> EPA believes it is reasonable to exempt plants from the standard when the cost of the standard is unreasonably high in comparison to the achieved emission reductions. Therefore, EPA decided to determine a cutoff for exempting these plants based on a cost and emission reduction analysis.

Office of Air Quality, EPA, Pub. No. 450/3-80-032b, *Benzene Fugitive Emissions - Background Information for Promulgated Standards* 2-104 (1982) (BID).

The agency recognized that industrial plants with the fewest pieces of equipment, and so the fewest sources of leaks, were probably the least likely to emit emissions. But it determined that it could not define the exemption in terms of number of pieces of equiqment or sources of leaks because such an approach "could not be applied readily to small or intermittent users of benzene" whose "facilities often require frequent repiping." BID at 2-104. Instead, EPA conducted studies and found that when the design production of a plant was about 1,000 megagrams per year, the plant contained 87 pieces of equipment and would be expected to emit only about 6 megagrams of benzene per year, applying the proposed regulations to such plants would only result in a reduction of 4 megagrams of benzene emissions per year. EPA concluded that the cost of imposing the regulatory requirements to such small plants was "unreasonably high *in comparison to the achieved emission reductions*" and so those plants could properly be exempted from the regulatory requirement. *Id.* (emphasis added).[2]

Accordingly, in formulating the exemption, EPA used the 1,000 Mg cut off rate as a proxy to exempt plants that had so few sources of leaks that they would be expected to emit only 6 megagrams of fugitive benzene per year. The Celriver plant most decidedly does not fall within that category. Rather, it had thousands of sources of benzene leaks (nearly 17,000 as of November 1990) and was one of the largest sources of benzene emissions in the nation during the period at issue in this suit, with annual emissions reaching 226 megagrams (nearly 500,000 pounds). Thus, HCC's Celriver plant was not

---

[2] HCC asserts that this regulatory history only demonstrates that the purpose of the exemption "was to exempt facilities from implementing the standards of the benzene NESHAP where the *cost would be unreasonably high.*" Brief of Appellee at 26 (emphasis added). That argument, of course, overlooks the remainder of the language from the administrative record, which is quoted and emphasized above.

the kind of plant that EPA envisioned in creating the exemption.

In sum, EPA's interpretation accords with the plain language of the NESHAP, as well as the purposes of the Clean Air Act and of the exemption itself.

B.

Nevertheless, HCC asserts that EPA's interpretation merits no deference because it was one "created" after the fact for this litigation. HCC principally relies on isolated language in the preamble, BID, and EPA correspondence.[3] This scattered language hardly compels the company's interpretation of the regulations.

For example, in the preamble, EPA does occasionally employ the term "consume" in lieu of "use" in a discussion of the operations of pharmaceutical companies. *See* NESHAP preamble, 49 Fed. Reg. at 23,510. However, as the district court explained, this scarcely proves that

---

[3] HCC erroneously asserts that "there are over 100 places in the rulemaking record where EPA uses the terms 'use' and 'consume' interchangeably." Brief of Appellee at 8. In fact, there are only a few occasions in the rulemaking record in which EPA employs "consume" in lieu of "use" and, as explained in text above, those instances are ambiguous. The additional references on which HCC relies are not contained in the rulemaking record at all. *See* 42 U.S.C.A. § 7607 (d)(7)(A) (West 1995) (defining rulemaking "record" for purposes of judicial review); 42 U.S.C.A. § 7412(e)(4) (West 1995) (applying § 7607 standards to emissions standards). Rather, they appear in correspondence with various EPA regional offices or state environmental agencies *after* the NESHAP was promulgated. Many of the references in this correspondence were authored by plant owners and operators, not EPA or other environmental agencies; furthermore, the agencies' use of "consume" in lieu of "use" even in the post-promulgation correspondence is subject to differing interpretations. *See infra* n.6.

HCC also refers to its interpretation of use as a "single counting" approach and denominates EPA's interpretation as a "multiple counting" approach. Although the district court adopted this nomenclature, it does not appear anywhere in the NESHAP or in the rulemaking record. Accordingly, we do not employ it here.

EPA limited the meaning of "use" in the regulations to "consume".

> These passages from the [administrative] record . . . do not lead inevitably to the conclusion that EPA intended the word "use" in the exemption to mean *only* "consume".

Hoechst Celanese, 964 F. Supp. at 976. (emphasis added). Clearly, one type of "use" is "consumption;" EPA does not claim to the contrary. The agency simply asserts that "use" also includes utilization or employment. Although the preamble contains evidence that "use" includes "consumption," it in no way requires the conclusion that "use" is limited to "consumption."

Similarly, EPA describes the exemption in the rulemaking record as establishing a cut off for "a plant design usage or throughput rate of benzene equal to or less than 1,000 Mg/yr per plant" and explains that "throughput" is "determined by a mass balance during the design stages of process operation, accumulating all benzene processed in 1 year." BID at 2-105. HCC asserts that "throughput" in this context can only refer to a "plant's overall net production or consumption . . . not recirculation rates." But again, the district court recognized that " 'throughput' and 'consumption' are not synonymous . . . . 'throughput can describe, for example, the flow of benzene through equipment like the quench chamber and main still"—just as EPA asserts.

Finally, numerous EPA letters issued in the summer and fall of 1984, shortly after the initial promulgation of the NESHAP in June 1984, severely undermine HCC's entire *post-hoc* argument.[4] For example, on August 20,

---

[4] Recognizing the impact of these EPA documents, HCC urges (somewhat inconsistently with its claim that EPA's interpretation is an after-the-fact creation for litigation) that these documents demonstrate EPA's attempt immediately after promulgation of the NESHAP to narrow the exemption by broadening the meaning of "use." Brief of Appellee at 15. To prevail on this argument, HCC

1984, EPA answered an inquiry from a Texaco plant manager stating that "use" was to be determined by "the overall quantity of benzene used in equipment," not "consumption." On October 5, 1984, EPA told an applicant seeking an exemption, "the 1000 megagrams per year cut off limit is applicable to total *processing rates* rather than net consumption (usage) or net production, of all affected equipment at an entire plant site." (emphasis in original). That same month, EPA informed another exemption applicant that the "1,000 megagrams per year cut off limit is applicable to total processing rates, rather than net consumption (usage) or net production." A few days later, EPA wrote still another applicant that the "1,000 megagram per year cut off limit is applicable to total *processing rates* of all affected equipment at an entire plant site." (emphasis in original). The next month, EPA informed its regional offices that "We have determined the cut-off is based on the throughput or processing rate, rather than consumption." There are a number of other contemporaneous letters from EPA to the same effect. In view of this evidence, it is simply impossible to conclude, as HCC argues, that EPA formulated its broad interpretation of the exemption as a strategy for litigation initiated in 1992, eight years after the regulation was originally promulgated.

For all of these reasons, we agree with the district court that EPA's interpretation of its own regulations deserves deference.[5]

---

would have to have demonstrated that "use" in the NESHAP necessarily meant only "consume." As noted above, the district court concluded and we agree that this conclusion is unwarranted.

[5] In reaching this conclusion, we give no weight to the 1995 affidavit of a former EPA employee, Robert Ajax, which was prepared and submitted on HCC's behalf for this litigation. Like similar affidavits from individual legislators, it is entitled to no weight as to the meaning of legislation enacted, or in this case a regulation promulgated, eleven years earlier. *See Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13

III.

The more difficult question is whether, and if so when, HCC was afforded fair notice of the EPA's interpretation.

Due process requires that a party must receive fair notice before being deprived of property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Moreover, it is well established in criminal law that no punishment can be imposed without notice. *See, e.g., United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 32-33 (1963); *United States v. Bennett*, 984 F.2d 597, 605 (4th Cir. 1993). Although the Supreme Court has not directly addressed the question, we have concluded that because civil penalties are "quasi-criminal" in nature, parties subject to such administrative sanctions are entitled to similar "clear notice." *See First American Bank v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985). A "regulation[ ] which allow[s] monetary penalties against those who violate [it], . . . must give . . . fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *Id.* (quoting *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) (citation omitted)).

To determine if a party has received fair notice, we must examine the relevant facts of each case. *See Bennett*, 984 F.2d at 605. In this case, that requires separate examination of two time frames: (1) the period from 1984 (when the exemption was originally promulgated) to 1989 (when EPA became aware of the operations of the Celriver plant and directly contacted HCC); and (2) the period after the 1989 contacts between EPA and HCC until 1992, when HCC finally complied with the regulation). We address each period in turn.

(1980) ("Such history does not bear strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change.").

A.

In support of its claim that HCC had fair notice of EPA's broad interpretation of the regulations from the time they were originally promulgated in 1984, EPA offers two interrelated arguments.

1.

First, the agency asserts that the plain language of the NESHAP and the rulemaking record should have put HCC on notice that the Celriver plant did not qualify for an exemption. For example, EPA contends that HCC should have known that its Celriver plant with nearly 17,000 pieces of equipment and substantial benzene emissions could not possibly be exempt. In support of this argument, EPA points out that "use" is a broad term, and that what is at issue here is an exemption and exemptions are to be narrowly construed. *See, e.g., Duquesne Light Co. v. EPA*, 698 F.2d 456 (D.C. Cir. 1983) (narrowly construing a Clean Air Act exemption). EPA also notes that the rulemaking record indicates that this was intended to be a "small plant" exemption designed to accommodate companies with limited use and emissions of benzene. *See* NESHAP preamble, 49 Fed. Reg. at 23,510. EPA maintains that if HCC had any doubt on the matter because of EPA's reference to "consume" in lieu of "use" in some portions of the rulemaking record, it had an obligation to contact the agency for clarification. *See, e.g., Texas E. Prods. Pipeline Co. v. OSHRC*, 827 F.2d 46, 50 (7th Cir. 1987) (finding fault with company's failure to make any inquiry of the administrative agency responsible for the regulations at issue).

EPA's argument is not without force and in another case might well carry the day. Generally, "ignorance of the law or a mistake of the law is no defense," *Cheek v. United States*, 498 U.S. 192, 199 (1991), and a claim of lack of notice "may be overcome in any specific case where reasonable persons would know that their conduct

is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). However, as EPA recognizes, "it is crucial to examine the particular situation of the defendant, and whether *it* lacked reasonable notice." Brief of Appellant at 29 (emphasis in original). Examination of the particular facts of this convinces us that, prior to 1989, HCC did not have fair notice of the EPA's broad interpretation of the term "use."

Although as noted above, nothing in the NESHAP itself or the rulemaking record forecloses EPA's interpretation of the exemption, at the same time nothing mandates it. Indeed, some of the language in the preamble (e.g., EPA's references to "consume" in lieu of "use") supports HCC's narrower interpretation. Moreover, as the district court noted, just because the Celriver plant was not a small plant with few emissions, it was not necessarily put on notice that it was subject to the regulations, given that even under EPA's interpretation of "use," some plants with many pieces of equipment and significant emissions theoretically could be exempt. Thus, we cannot hold that the regulations, their preamble, or purpose clearly put HCC on notice that the Celriver plant did not qualify for an exemption.[6]

We need not determine if, as EPA maintains, the NESHAP and rulemaking record at least provided HCC with "reason to know that its exemption claim rested on

---

[6] HCC also contends, and the district court held, that EPA regional offices assertedly interpreted the exemption inconsistently and that this provides additional support for the company's claim that EPA failed to provide it fair notice. *See Hoechst Celanese*, 964 F. Supp. at 981. Some of the EPA documents on which HCC relies can be read, as the company asserts, as providing conflicting interpretations of "use." Most, however, can at least as easily be read as consistently requiring EPA's broad interpretation whenever that question was raised and/or relevant. But given our conclusion that EPA failed to provide fair notice to HCC from 1984 to 1989, we need not reach the question of whether these documents constitute a proper additional basis for a grant of summary judgment on that question.

extremely shaky grounds" and so triggered an obligation to ask for clarification of the meaning of "use." Brief of Appellant at 31. If HCC did have such an obligation, it fulfilled it by communicating with the Texas Air Control Board (TACB), the state agency that EPA had empowered to implement and enforce the NESHAP in Texas.

The undisputed facts are as follows: in August 1984 (a few months after promulgation of the NESHAP), HCC sought information from the TACB as to whether an HCC plant located in Bishop, Texas, which also recycled benzene, was exempt under 40 C.F.R. § 61.110(c)(2). The TACB referred HCC to an August 1984 letter that EPA's Region 6 office sent to a Texaco facility in Texas that used recycled benzene. This letter stated that "*use* is not meant to imply consumption, but rather is meant to reflect the overall quantity of benzene used in equipment at a facility." This letter does seem, as EPA maintains, to support EPA's broad definition of "use." Indeed, contemporaneous HCC internal communications indicate that HCC itself so interpreted EPA's response; for example, one HCC official hand wrote on the Texaco letter "Read it and weep" and another HCC official wrote a memo noting "EPA recently advised . . . that 'use' of benzene includes recycle." However, the TACB interpreted EPA Region 6's letter to Texaco as indicating that overall inventory was the determinant factor. Thus, the TACB concluded that the Bishop plant qualified for an exemption because it did not maintain an *inventory* of more than 1,000 megagrams of benzene. In December 1984, the TACB sent a short letter to HCC informing the company that the Bishop plant was "exempt from the requirements of Section 61.112," the section mandating source compliance with the NESHAP. Although EPA Region 6 received a copy of that letter, it took no action to rescind or invalidate the exemption. HCC then concluded that the Celriver plant, which used benzene in a manner similar to the Bishop plant, was also exempt.

In addition to the Bishop plant, HCC operated another plant in Pampa, Texas. That plant, like the Celriver and Bishop plants, continually recycled benzene through a closed loop system but because the Pampa plant "consumed" more than 1,000 megagrams of benzene per year even under HCC's interpretation of "use," it was not exempt from the NESHAP requirements. For this reason, in September 1984, HCC applied to the TACB for a two-year waiver from compliance with the NESHAP for the Pampa plant so that HCC could "reduce the quantity of benzene consumed in the plant to less than 1,000 megagrams" and thus become exempt. In April 1985, the TACB approved the waiver request; copies of that request and TACB's approval were sent to EPA Region 6, which took no action to invalidate the waiver.

These undisputed facts demonstrate that, although HCC made no direct inquiry as to the application of the exemption to the Celriver plant, it did not fail to make *any* inquiry as to the meaning of the NESHAP. *Cf. Texas E. Prods.*, 827 F.2d at 50. Rather, it asked TACB for an exemption and wavier of the regulation for two HCC plants located in Texas, which recycled benzene just as the Celriver plant did. In response, TACB issued the requested exemption and waiver, with copies to EPA's Region 6. We recognize that although Region 6 received copies of TACB's letters granting the exemption and waiver to the Bishop and Pampa plants respectively, those letters were short and may not have fully informed the agency of their impact. But in addressing whether a party has received fair notice, we look at the facts as they appear to the party entitled to the notice, not to the agency. On the basis of the TACB's actions and the inaction of EPA Region 6, the company had reason to believe that its interpretation of the exemption—equating "use" to "consumption"—was accurate. When these facts are viewed in the context of a rulemaking record that included some references to "use" in lieu of "consume," we

must conclude that HCC did *not* receive fair notice of EPA's broader interpretation of the term in the 1984-89 period.

2.

As a corollary to the above argument, EPA asserts that the NESHAP required a plant owner to apply for an exemption and file an initial report and that HCC's failure to do either prevents it from now claiming a right to the exemption. As noted above, immediately after EPA issued the NESHAP in 1984, numerous other plant owners inquired as to the meaning of "use," applied for exemptions, and filed initial reports. HCC, in contrast, never applied for an exemption or filed reports.

The district court held that HCC's contacts with TACB constituted as "indirect[]," informal application for an exemption for the Celriver plant. *Hoechst Celanese*, 964 F. Supp. at 979. We cannot agree. Whatever the authority of the TACB or EPA Region 6 in Texas, they had no authority to grant an exemption in South Carolina and no ability to grant an exemption (by implication) to a plant about which they knew nothing. Thus, if the NESHAP had clearly mandated that the owner of a plant seeking an exemption apply for the exemption, HCC's Celriver plant failed to meet this requirement.

Accordingly, we turn again to the relevant regulatory language. The NESHAP provides in pertinent part:

> Any equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year *is* exempt from the requirements of § 61.112.

§ 61.110(c)(2) (emphasis added). Thus, the plain language of the regulation suggests that the exemption is self-executing and provides no discretion to the EPA administrator to determine whether or not to grant an exemption. Section 61.110(c)(1) does state that "[i]f

an owner or operator *applies* for one of the exemptions in this paragraph," he must maintain certain records. (emphasis added). But it is impossible to conclude that this reference clearly requires a plant owner or operator to file an application for an exemption, in view of the absence of any explicit directive in § 61.110(c)(2), or any instructions in any other portion of the regulations as to how, where, when, or in what form such applications for exemptions are to be made. We note that elsewhere in the same regulations when EPA requires an application for a waiver of the NESHAP's requirements, it specifies in detail the procedures for the application. *See* 40 C.F.R. §§ 61.10(b), 61.11 (1996); see also § 61.112(c) (1996) (setting out procedures for application for an alternative method for attaining compliance). Thus, we do not believe the NESHAP provides fair notice that a plant owner or operator must apply for an exemption.

Nor do we believe the regulations provide fair notice that the owner of exempt equipment must file an initial report. The NESHAP requires an "owner or operator of [an] existing source" of benzene emissions to file an initial report within 90 days of promulgation of the regulations. 40 C.F.R. § 6.10(a) (1996). EPA asserts that the exemption in § 61.110(c)(2) does not allow an owner or operator to avoid the initial report requirement because that exemption only exempts "equipment," i.e., "sources," and does not eliminate reporting obligations imposed in other portions of the NESHAP on owners and operators of such equipment. EPA may be correct that this is what is intended. But we cannot hold that the plain language of § 61.10(a) provides clear notice of this intent. As EPA concedes, the reporting requirement is linked to the exemption provision; by requiring exempt companies to file reports, EPA can determine continued eligibility for that exemption. Since we have determined that HCC lacked fair notice of the need to apply for an exemption, we can not now hold it should have known to

submit reports to monitor continued eligibility for an exemption.

In sum, we agree with the district court that prior to 1989, HCC did not have fair notice of EPA's interpretation of the NESHAP or of a regulatory obligation to apply for an exemption or file reports.

B.

Finally, we must determine whether HCC continued to lack fair notice after 1989, when EPA's Region 4 office, the office responsible for enforcement of the NESHAP in South Carolina, directly informed officials at HCC's Celriver, South Carolina plant of the proper interpretation of the regulations.

1.

On June 13, 1989, EPA Region 4 wrote the HCC official responsible for regulatory compliance at the Celriver plant, informing him that "[i]f benzene is recycled" then "use" for purposes of the exemption must be calculated on the basis "of total cumulative flow through the process rather than net benzene consumption or usage." The EPA letter stated that "it appears that [HCC] may be subject" to the NESHAP requirements and asked HCC to forward information necessary "to determine the full extent and duration of all benzene emissions" within thirty days. Two weeks later, on June 26, HCC responded. Asserting that the Celriver plant recycled benzene and so under HCC's definition of "use," i.e., consumption, the plant was exempt, the company did not forward the requested information.

However, on July 28, 1989, senior HCC Celriver officials met to discuss the EPA's June 13 letter. Minutes of that July meeting indicate that by that time, HCC officials well understood that EPA did not accept the company's interpretation of "use." The minutes of the July meeting note in pertinent part:

> The EPA standard for fugitive benzene emissions may be applied to Celriver. *The limit of 1000 megagrams benzene per year (2,205,000 pounds per year) is applied to throughput instead of consumption. Process throughput or recycle is considerably greater than this limit.* Stringent EPA controls would thus apply to existing process equipment. *The full implication of this interpretation must be determined and steps taken to meet compliance.*

(emphasis added).

Moreover, unaware of HCC's internal discussions of the matter, on August 18, 1989, EPA Region 4 responded to HCC's June 26 letter noting that "it appears that you are unaware of EPA's interpretation of benzene usage as the term is used to determine applicability." In this letter, EPA proceeded to explain carefully and in no uncertain terms that benzene usage equaled "total cumulative flow through equipment in benzene service rather than net consumption." The letter contained an explicit example of how to determine usage in the exemption and asked HCC to forward the information originally requested in mid-June within thirty days. In September, still noting its objection to EPA's interpretation, HCC finally forwarded the requested information—pursuant to EPA's interpretation of "use," the Celriver plant's use of benzene exceeded 2.5 million megagrams of benzene per year. On February 20, 1990, EPA Region 4 issued HCC Celriver a notice of violation and in April 1990, HCC submitted a plan to redesign its Celriver plant to bring it into compliance with the NESHAP.

In short, HCC received in June 1989 a letter from EPA Region 4 unequivocally setting forth the agency's interpretation, and the record establishes that at least by July 1989 HCC well understood EPA's position. Moreover, in August 1989 EPA Region 4 expressly reiterated the interpretation stated in its June letter. Further, these 1989 letters from EPA Region 4 to HCC Celriver must

be regarded as representing the agency's authorative interpretation of the benzene exemption as it affected the Celriver plant. In its appellate brief, HCC itself concedes as much. *See* Brief of Appellee at 45 n.29 ("HCC does not dispute the fact that EPA Region IV is authorized to communicate the agency's interpretations of its own regulations to the regulated community.").

2.

In spite of these uncontroverted facts, the district court held that HCC "did not have actual notice" of EPA's interpretation "in the summer of 1989." *Hoechst Celanese*, 964 F. Supp. at 984. The court reasoned that EPA Region 4's 1989 letter to HCC were contrary to "statements" in the rulemaking record (e.g., "consume" in lieu of "use") and to other letters from EPA and state environmental agencies interpreting the NESHAP. *Id.* For this reason, the court concluded that HCC had a "legitimate basis for believing" that the 1989 letters from EPA Region 4—the region charged with supervision of the Celriver plant—did not "speak[ ] for the Administrator" of the EPA. *Id.* The district court further held that even the notice of violation could "not be deemed as having provided Hoechst Celanese an authoritative interpretation of the benzene exemption." *Id.*

With regard to the asserted conflict between EPA Region 4's 1989 letters to HCC Celriver and statements in the rulemaking record, the district court's conclusion is at odds with its earlier holding deferring to EPA's interpretation of the NESHAP. The district court initially held that it should and would defer to EPA's interpretation *inter alia* because the rulemaking record did *not* conflict with that interpretation. We believe, as explained above, that the district court correctly analyzed this issue at the outset of its opinion, when it concluded that "[t]hese passages from the record . . . do not lead inevitably to the conclusion that EPA intended the word 'use' in the exemption to mean 'consume.' " *Id.* at 976.

Accordingly, we necessarily must reject the argument that statements in Region 4's 1989 letters to HCC conflicted with the rulemaking record.

Nor can HCC rely on letters from EPA and state environmental agencies to other owners or operators about other facilities that allegedly adopt an interpretation of the exemption contrary to that which EPA directly conveyed to HCC Celriver in 1989. First, *no* communication from EPA Region 4—the office charged with enforcement of the NESHAP in South Carolina—conflicts with Region 4's definitive 1989 letters to HCC Celriver.[7]

As to the asserted contrary interpretation of "use" by other EPA offices or state agencies, HCC presents no evidence that the company knew of any contrary interpretations issued during or after 1989. Without contemporaneous knowledge of and reliance on these allegedly inconsistent interpretations, HCC had no reason to believe EPA Region 4 was providing it with anything other than EPA's definitive interpretation of the NESHAP.

Finally, the fact that previous letters from state environmental agencies concerning HCC plants in Texas and Virginia[8] assertedly conflict with Region 4's 1989 letters to HCC Celriver does not in anyway undermine the force of the latter. Whether a state environmental agency had previously supplied advice that may appear to conflict with EPA Region 4's definitive instruction to the Celriver

---

[7] Thus, HCC's reliance on Region 4's communications with the Department of Energy's Savannah River Site (SRS) is misplaced. Based on information SRS initially supplied in 1989, the EPA could not determine whether the not-yet-built consolidated incineration facility (CIF) would be exempt. Subsequently, in 1995, upon learning that the CIF would recirculate benzene in amounts greater than 1,000 mg/yr, EPA concluded the operation would be subject to the benzene NESHAP.

[8] There is little evidence in the record as to the circumstances of the Virginia exemption. However, there is no evidence that any EPA regional office approved that exemption.

plant in the summer of 1989 is immaterial. In 1989, EPA Region 4, indisputably the office responsible for enforcement of the NESHAP in South Carolina, provided the HCC Celriver, South Carolina plant with unequivocal, actual notice as to how the regulation pertained to that plant's operations, i.e., benzene usage applied to "total cumulative flow through equipment in benzene service rather than net consumption." It is well established that "even if the agency has not given notice in the statutorily prescribed fashion, actual notice will render that decision harmless." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 n.7 (9th Cir. 1992); *Shelton v. Marsh*, 902 F.2d 1201, 1206 (6th Cir. 1990) (same); *New York v. Bowen*, 811 F.2d 776, 780 (2d Cir. 1987) (same); *Small Refiner Lead Phase-down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (same) (dicta). *See also Maryland v. Antonelli Creditors' Liquidating Trust*, —— F.3d ——, No. 96-1111, 1997 WL 523681 (4th Cir. Aug. 26, 1997); *Greene v. Whirlpool Corp.*, 708 F.2d 128, 131 (4th Cir. 1983).

It would be another matter if different officials within EPA Region 4 had issued conflicting interpretive letters to HCC Celriver. But that is not the case here. The HCC Celriver plant received but one message from EPA Region 4—recycled benzene must be counted in determining how much benzene a plant is designed to use. Letters from the EPA regional office responsible for the State of South Carolina—regardless of any conflict with previous guidance received by another HCC plant from an agency with no authority in South Carolina—placed the HCC Celriver plant on actual notice of EPA's interpretation.

For these reasons, we must conclude that EPA Region 4's 1989 communications with HCC Celriver not only should have put the company officials at the Celriver plant on notice, but did put them on notice of EPA's interpretation of the NESHAP. Minutes from HCC's July 28, 1989 meeting convened after receipt of the first EPA letter supports this conclusion. These minutes unequivo-

cally demonstrate that HCC officials understood that "[t]he limit of 1,000 megagrams benzene per year . . . is applied to throughput instead of consumption." Moreover, if HCC had had any remaining doubts after receipt of EPA's first letter, EPA's second (August 1989) letter would have eliminated them.

3.

We also reject the district court's alternative grounds for refusing to find HCC Celriver liable for any violations of the NESHAP after August 1989. The district court apparently believed that imposition of liability was inappropriate for two additional reasons: (1) EPA did not object to the redesign schedule that HCC Celriver submitted in April 1990 to bring the plant in compliance with the NESHAP and the company made significant expenditures pursuant to that plan to reduce overall benzene use by August 1992; and (2) if HCC had applied for a waiver for the Celriver plant, it would likely have received one. *Hoechst Celanese*, 964 F. Supp. at 984-85.

At oral argument, HCC conceded, as it had to, that the present litigation solely addresses liability. Congress has directed that a court should address a "violator's full compliance history and good faith efforts to comply" not at the liability phase of the litigation but at the penalty phase. *See* 42 U.S.C.A. § 7413(e) (West 1995); *see also United States v. B & W Inv. Props.*, 38 F.3d 362, 368 (7th Cir. 1994) (applying § 7413(e) criteria in penalty deliberations). Thus, the district court erred when it factored in compliance efforts as a reason for denying *liability*.

Moreover, nothing in the NESHAP provides that upon receiving a proposed compliance schedule, EPA is deemed to accept that schedule if the agency does not respond within a certain period of time. Nor did EPA's lack of response to the proposed compliance schedule preclude it from imposing civil penalties on HCC. The only possible

legal basis for such a result would be an estoppel of some sort, and it is well-established that with rare exceptions "equitable estoppel will not lie against the Government as it lies against private litigants." *OPM v. Richmond*, 496 U.S. 414, 419 (1990); *see also United States v. Agubata*, 60 F.3d 1081, 1083 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 929 (1996).

Finally, HCC cannot rely on the NESHAP waiver provision which states:

> Based on the information provided in any request . . . the Administrator *may* grant a waiver of compliance with a standard for a period not exceeding two years after the effective date of the standard.

40 C.F.R. § 61.11(a) (1996) (emphasis added). The regulatory language unambiguously provides that the grant of a waiver is within the EPA Administrator's discretion. EPA might—or might not—have granted the HCC Celriver plant a waiver if the plant had not met NESHAP's standards within ninety days, but HCC had no right to expect one. We will therefore not presume here that the company would have received a waiver.

Officials at the HCC Celriver plant had actual notice of EPA's interpretation of the NESHAP at least by the time they received EPA's August 1989 letter. The NESHAP mandates full compliance from an existing source within ninety days of the standard's effective date. *See* 40 C.F.R. § 61.05(c) (1996). Since HCC lacked fair notice of EPA's interpretation at the time of promulgation of the benzene NESHAP, the ninety-day period does not commence until HCC's received actual notice of that interpretation in August 1989. By failing to comply with the NESHAP's requirements within ninety days after receiving EPA's August 1989 letter, HCC Celriver necessarily violated the regulations. These violations continued at least until August 1992. We remand the case to the district court for consideration of the proper penalties, if any, for those violations.

IV.

We affirm the district court's order in all respects, except as to whether after August 1989, HCC Celriver had notice of EPA's interpretation of the NESHAP exemption. We hold that by August 1989, EPA had provided HCC actual notice that the Celriver, South Carolina plant did not qualify for that exemption. We remand the case to the district court so that it can determine if, and in what amount, penalties should be imposed for the post-August 1989 violations of HCC's Celriver plant.

No. 96-2003—*AFFIRMED IN PART AND REVERSED AND REMANDED IN PART*

No. 96-2051—*AFFIRMED*

NIEMEYER, Circuit Judge, concurring in part and dissenting in part:

I concur in Parts I., II., and III.A., but I find that I must dissent from Part III.B. I believe not only that the regulatory scheme was ambiguous but also that the EPA interpreted its regulations with considerable ambivalence, denying any person seeking to comply with them a consistent and clear course to follow. To penalize a company that, by concession of the majority opinion, was not given fair notice of any EPA interpretation at least until 1989 and then thereafter chose to follow one EPA Region's interpretation over another would be, in my judgment, fundamentally unfair. I have no difficulty with enforcing any consistent and rational EPA interpretation prospectively, but to impose penalties in the circumstances of this case is tantamount to punishment on the unfocused whim of a bureaucracy that could not itself agree on the proper reading of its own regualtion.

The Clean Air Act, 42 U.S.C. § 7401 et seq., creates a diverse regulatory scheme to lessen air pollution and confers broad power on the EPA to draft regulations to implement the statute. In 1984, the EPA published regulations to control the emission standards for equipment leaks of benzene, requiring industrial plants producing or using benzene to monitor for leaks, to repair leaks, and to install equipment to capture benzene emissions. The regulations also impose reporting and record keeping requirements. Violations are subject to civil penalty. Intending to exempt small volume producers and users of benzene because of cost concerns, the regulations exempt those plants that are designed "to *produce* or *use* less than 1,000 megagrams of benzene per year." 40 C.F.R.

§ 61.110(c)(2) (emphasis added). The issues in this case are whether Hoechst Celanese's Celriver (South Carolina) Plant *produces* or *uses* 1,000 megagrams of benzene per year and whether the EPA's interpretation of "produces or uses" was sufficiently clear to Hoechst Celanese in 1989 so as to justify imposing on it penalties for not complying with an EPA official's interpretation of the regulation within 90 days.

Reading the regulation on its face, the words "produces or uses" are complementary terms designed to provide a basis of measurement for the amount of benzene manufactured by or employed at a plant. The amount of benzene that a plant produces would seem to be a straightforward calculation measured by the amount of benzene that exits from a plant's manufacturing process. To measure the amount of benzene that a plant "uses" in a year would appear to require a measurement of the amount of benzene introduced into the manufacturing process during the course of a year. This natural reading would thus include in the amount all inventory of benzene in use at a plant during the entire year plus any amounts consumed by the process. If that total were less than 1,000 megagrams per year, one would expect that the plant would be exempt from regulation.

At different times and in different contexts, the EPA has shared in part my natural reading of the regulation. When the EPA first published its regulations, it appears to have assumed that its own regulations were to be read so that "use" means "consumption." This is reflected in the preamble to the regulation as originally published, where the EPA stated:

> The possibility that pharmaceutical operations could be adversely affected by the standard is very small. This is true for several reasons. First, most pharmaceutical plants use very little benzene. According to estimates contained in *Market Input/Output Studies —Benzene Consumption as a Solvent* (EPA-560/6-

> 77-034, October 1978, p. 41), 1978 benzene *consumption* by pharmaceutical manufacturers was about 0.72 Gg. No companies *consumed* more than 1,000 Mg/yr in 1978. The commenter states that they consumed about 325 Mg/yr during 1981. Thus, it is unlikely that pharmaceutical operations would be affected by the standard because the final standard exempts equipment at plant sites that are designed to produce or use 1,000 Mg/yr or less of benzene. Second, Benzene *consumption* by the pharmaceutical industry is declining rapidly. The market input/output study just noted estimates that *consumption* declined from 2.14 Gg in 1976 to 0.72 Gg in 1978, a decline of about 66 percent over the 2-year period.

49 Fed. Reg. 23,510 (June 6, 1984) (emphasis added). But when individual representatives of the EPA interpreted EPA regulations, they recognized that if benzene was introduced into a manufacturing process and exited it, the "throughput" should be the basis for measurement in determining "use." For example, on October 16, 1984, an internal memorandum from the EPA Standard Development Branch to another section provided:

> As you requested, I will articulate our position on the 1,000 Mg/yr plant site cut-off in the benzene equipment leak standard. This cut-off is based on an analysis showing plants having few [pieces of] equipment in benzene service should not be covered by the standard. This analysis relates the low number of [pieces of] equipment to a process rate in Mg/yr. *This process rate is not based on consumption of benzene but rather throughput through the equipment in all process units of a plant site.* The standard requires owners/operators to demonstrate the design capacity for each process unit in a plant, and we should sum these capacities and compare this sum to the 1,000 Mg/yr.

(Emphasis added). This position was reiterated a month later by the EPA's Office of Air Quality Planning and

Standards which issued a memorandum to all EPA Regional Air Program Branch Chiefs as follows:

> The question is whether the cut-off total is based on consumption or processing rate. We have determined the cut-off is based on the throughput or processing rate, rather than consumption.

While various persons at the EPA were debating whether "consumption" of benzene or the "throughput" was to be the basis for measurement, the EPA Regional Director from Region VI took the position that the benzene used was to be quantified in the same way as any inventory of a plant normally would be quantified:

> After review of [the regulatory provision], and based on our discussion with Headquarters' staff, we differ from you [Texaco] in our interpretation of the provision. It is EPA's position that the word *use* is not meant to imply consumption, but rather is meant to reflect the overall quantity of benzene used in equipment at a facility. In determining the environmental, health economic and energy impacts in setting the benzene standard, estimates were based on the number of pieces of equipment utilizing benzene and the quantity of benzene in use, rather than on the overall plant consumption (conversion) rate of benzene. Therefore, to determine if a plant produces or *uses* greater than 1000 megagrams per year of benzene, the total quantity of benzene in use at the facility needs to be considered, not the consumption.

(Emphasis in original). Region VI, thus, required the amount of benzene used to be measured by the "total quantity in use" at the facility—i.e., an inventory measurement. This letter, originally written to Texaco, was provided to Hoechst Celanese by the Texas Air Control Board in the course of giving Hoechst Celanese an exemption for its Bishop Plant in Texas, as it was authorized to do under the Act.

The EPA thus had at least three different approaches for measuring use: (1) the *consumption* of benzene in a year, (2) the *throughput* of benzene through a plant for a year, and (3) the *total quantity in use* at the plant.

In June 1989, the EPA Regional Director in Region IV, which included jurisdiction over Hoechst Celanese's Celriver Plant, wrote Hoechst Celanese that the Celriver Plant "may be subject" to benzene regulation and requested data on Celriver's benzene "throughput on an annual basis." When Hoechst Celanese responded that the Celriver Plant was exempt because it consumed less than 1,000 megagrams per year, the Region IV Director sent a letter stating that "it appears that you are unaware of EPA's interpretation of benzene usage as the term is used to determine applicability." The Region IV Director then explained: ,

> [B]enzene usage is intended to mean total cumulative flow through equipment in benzene service rather than net consumption[.] [Y]ou reported your benzene usage for the years 1984 through 1989 in terms of the amount of benzene added to maintain the levels in your closed recirculation system. Therefore, the paragraph below provides an example of how to calculate benzene usage for a hypothetical example. After reviewing the example, you should have a better understanding of how the term benzene usage is to be interpreted.

The letter then described how in a closed recirculation system, the benzene should be measured at a single point so that it is counted every time it passes a fixed point. The Region IV Director considered that this form of measurement was an acceptable interpretation of "throughput."

Up until this point, the EPA as an agency had not addressed how to measure benzene in a closed recirculation system. While the EPA Region VI Director applied the regulation to a closed system by directing the measurement

of the "total quantity in use" at the plant, the Region IV Director was interpreting it as the rate of flow through a single point in a closed system. Thus, Region IV proposed *re*counting the benzene every time it passed the single point. EPA Region IV did not, however, explain how many measuring points should be utilized. In a complex recirculation system made up of a grid of thousands of pieces of equipment, as was involved at the Celriver Plant, there are theoretically an unlimited number of measuring points at each joint and valve. Under this method, virtually any plant with a closed recirculation system would never qualify for the 1,000-megagram-per-year usage exemption.

While I agree with the majority that Hoechst Celanese had notice of the position of the EPA Region IV in August 1989, this notice should not, against the background of inconsistent EPA interpretations over time and throughout the different regions, constitute a definitive agency-wide EPA notice such that penalties could be imposed for non-compliance with one interpretation. For these reasons, I firmly believe that the district court properly concluded that the 1989 Region IV notice should not be considered the "authoritative interpretation" of the EPA.

I would go yet further and question whether the Region IV Director's notice is at all meaningful in view of the ambiguity about his interpretation.

For the foregoing reasons, I would affirm the district court's findings in their entirety.

APPENDIX B

[Filed May 10, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

C/A No. 0:92-1879-17

UNITED STATES OF AMERICA,
Plaintiff,

-vs.-

HOECHST CELANESE CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Introduction

The question presented in this case is whether Hoechst Celanese Corporation's Celriver Plant in Rock Hill, South Carolina, was required to comply with the National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene (Benzene NESHAP), 40 C.F.R. Part 61, subpart J, during the period 1984 to 1991. The Company implemented the NESHAP in 1991 and subsequently eliminated the use of benzene altogether from the Celriver plant. Thus, the focus of this litigation is the 1984-1991 time period.

On behalf of the Environmental Protection Agency (EPA), the United States initiated this action against Hoechst Celanese for allegedly violating the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the benzene NESHAP at Celriver. These regulations prescribe standards for

equipment in certain stationary sources that produce, use, or otherwise have in service benzene, a hazardous air pollutant, by requiring subject plants to monitor equipment regularly for leaks, to repair leaks promptly, and to install (in some circumstances) equipment that prevents, captures, or destroys benzene emissions. The regulations also include reporting and record keeping requirements. In its complaint, the United States seeks civil penalties of up to $25,000 for each violation.

The pertinent regulation provides an exemption for "any equipment in benzene service" that is "located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year." 40 C.F.R. § 61.110 (c)(2). The EPA contends that the Celriver Plant was designed to use more than two million megagrams of benzene per year, and therefore was not exempt from the regulation. Hoechst Celanese contends that the Celriver Plant was designed to use (and, in fact, used) less than 1,000 megagrams of benzene per year, and therefore was exempt. The dramatic difference between the two calculations is caused by the different ways the parties count the benzene for purposes of the exemption.

The two approaches produce vastly different results because the Celriver Plant recycled benzene, continuously using the same benzene. The total quantity of benzene at the Celriver Plant site never exceeded 1,000 megagrams per year. Hoechst Celanese maintains that the benzene should be counted only once, and therefore the Celriver Plant was exempt under the regulation. EPA argues that the benzene should be counted each time it cycles through two separate points inside the system, and therefore the Celriver Plant was not exempt.

Hoechst Celanese further argues that, even if the exemption contemplated what it calls the "multiple count" [1] ap-

---

[1] The government disagrees with the use of the words "multiple count" in describing its interpretation of the regulations. Whether

proach, the Company still should not be required to pay the civil penalty sought by the government because the Company did not receive the constitutionally required fair notice of the "multiple count" interpretation of the regulation.

The matter is now before the court on pivotal cross motions for summary judgment. The United States moved for partial summary judgment on the issue of liability for violations allegedly occurring between June 1986 and August 1992. The United States contends that Hoechst Celanese violated virtually all of the leak detection and repair requirements in the regulations, failed to install equipment designed to reduce fugitive benzene emissions, and failed to keep records and make reports to EPA. In total, the United States alleged thousands of violations of the Benzene Leaks NESHAP. Hoechst Celanese has cross moved for summary judgment on all claims. Oral argument was heard on both motions on February 2, 1996.

For the reasons set forth below, the court will grant the plaintiff's motion in part, by finding plantiff's interpretation of the applicable regulation to be reasonable. The court will also grant, in part, defendant's motion, concluding that because the Company was not afforded fair notice of the EPA's interpretation of the regulation, no civil penalty should be awarded in this case.

Summary judgment may only be granted under Federal Rule of Civil Procedure 56 when there are no genuine issues of material fact and the moving party demonstrates that it is entitled to judgment as a matter of law. The court must inquire into the genuineness and materiality of all purported factual issues and view all facts and inferences in a light most favorable to the party opposing the motion. *Drewitt v. Pratt*, 999 F.2d 774, 778 (4th Cir. 1993); *Ross v. Communications Satellite Corporation*,

---

the government's gloss on the regulation is denominated "multiple count", "internal recycle", or something else is not significant for purposes of this decision.

759 F.2d 355, 364 (4th Cir. 1985). When no genuine issue of material fact exists, the court has a duty to award summary judgment. *Drewitt v. Pratt*, 999 F.2d at 778-79.

I

The Celriver Plant was exempt under 40 C.F.R. § 61.110(c)(2) if it was designed to produce or use less than 1,000 megagrams of benzene annually. The facts regarding benzene at the Celriver Plant are essentially undisputed. Until March 1993, the Celriver Plant used benzene in, among other things, the production of acetic anhydride.[2] Hot ketene gases flowed into a quench chamber and were cooled with a continuous stream of benzene, with some of the ketene thereby being converted to acetic anhydride. The benzene used to cool ketene gases was called a "quench." The substances in the quench chamber then moved to a main still. In the main still, benzene, water, and other substances rose to the top and exited, while acetic anhydride and acetic acid left from the bottom of the still. A stream of benzene flowed into the still to make this separation process more efficient. Benzene used to increase the efficiency of the main still was called a "reflux agent."

---

[2] The facts in this section describing the Celriver Plant's design and use of benzene were derived from U.S. Mem. at 27-31, United States' Response to the Defendant's Motion for Summary Judgment and the Defendant's Opposition to the United States' Motion for Partial Summary Judgment ("U.S. Resp.") at 3-6, and Hoechst Celanese's Initial Brief at 26. The court's description of benzene use at Celriver focuses specifically on one of two process units at the plant, the acetic anhydride manufacturing process. A full description of this process is too technically complex to warrant its inclusion here, but the parties have provided a useful, if greatly simplified, depiction of certain of the most pertinent features of that process. The court notes that benzene was also used in another process unit at the Celriver Plant, the acid recovery unit. The Government does not discuss how benzene use would be calculated in this other process unit.

Benzene entering the quench chamber and main still had a prescribed temperature and purity. After it entered the quench chamber and main still, the benzene became hotter and less pure. For this reason, some of the benzene leaving the main still went through a series of steps that removed impurities and cooled the benzene back to its original temperature, while other portions of the benzene were recirculated immediately back to the main still. When the purification process was complete, the benzene that had been purified also recirculated back to the quench chamber and main still.

II

EPA contends that the Celriver Plant was not exempt because it was designed to use more than 1,000 megagrams of benzene annually. The court has jurisdiction to review EPA's interpretation, but "the scope of its review is limited to whether EPA's interpretation is plainly erroneous." *Potomac Elec. Power v. U.S. EPA*, 650 F.2d 509, 513 (4th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). EPA's interpretation need not be the only reasonable one, or even the interpretation the court would have preferred if the question had first arisen in a judicial proceeding. *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). Rather, the "agency's interpretation of its own regulation is of 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Talley v. Mathews*, 550 F.2d 911, 919 (4th Cir. 1977), *quoting Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945). *See also Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980).

Courts defer to an agency's interpretation of its own regulation for pragmatic and constitutional reasons. Deference to the agency's view ensures that a nationally uniform interpretation prevails without the need for the Supreme Court to opine on the meaning of every regulation. *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987). An agency is also more suited than

a court to make policy and scientific judgments within the agency's area of expertise. *Chevron U.S.A. v. Nat. Resources Def. Council*, 467 U.S. 837, 844-45 (1984) (deferring to EPA's interpretation of the Clean Air Act); *Citizens Against Refinery's Effects v. U.S. EPA*, 643 F.2d 178, 181-83 (4th Cir. 1981). Furthermore, courts recognize that Congress often confers upon an agency, rather than the courts, the province of "filling the interstitial silences within a statute or a regulation." *Milhollin*, 444 U.S. at 565.

A court's review of regulations under Section 112 of the Clean Air Act, such as the Benzene Leaks NESHAP, is particularly limited because of the broad discretion Congress gave EPA to control hazardous air pollutants. Under the Clean Air Act in effect when EPA promulgated the Benzene Leaks NESHAP, Congress delegated authority to EPA to identify hazardous air pollutants and their sources, to determine methods of controlling emissions from these sources, and to determine the level of control necessary to protect public health.[3] Through its exercise of these powers, EPA has developed considerable scientific and policy expertise in the regulation of hazardous air pollutants. *Natural Resources Defense Council v. U.S. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (*en banc*). This court treads lightly when construing the scope of an exemption that allows a source of hazardous air pollutants to go unregulated. The court will not substitute its own judgment on the scope of the exemption unless EPA's interpretation is plainly erroneous or inconsistent with the regulation.

---

[3] Clean Air Act, sec. 4(a), §§ 111(b)(1)(A) and 112(b)(1), 84 Stat. 1676, 1684-85 (1970), sec. 110, § 112(e), 91 Stat. 685, 703 (1977), and sec. 13(b), § 112(e)(5), 92 Stat. 3443, 3458 (1978) (current version at 42 U.S.C. §§ 7411-12 (Supp. V 1993)).

III

A. *The Language of the Regulation*

The exemption that Hoechst Celanese claims reads as follows:

> § 61.110(c) , , , (1) If an owner or operator applies for one of the exemptions in this paragraph, then the owner or operator shall maintain records as required in § 61.246(I).
>
> (2) Any equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year is exempt from the requirements of § 61.112.

The government argues that Hoechst Celanese does not qualify for the exemption provided for in section 61.110 (c)(2). Additionally, the government argues that even if Hoechst Celanese qualifies for the exemption, it nevertheless cannot claim the exemption in this case because it never affirmatively applied for the exemption. The court will address these issues seriatim.

1. *The Interpretation of the Exemption*

Interpretation of the exemption at issue in this litigation turns on the phrase "designed to . . . use" in section 61.110(c)(2).

EPA claims to give the word "use" its broad, ordinary meaning: to put into service, to employ, to utilize, to consume. In EPA's view, a plant is not exempt if, under its design, it uses benzene in one of these ways at a rate greater than or equal to 1,000 megagrams per year.

EPA maintains that the Celriver Plant was not exempt because it was not designed to use less than 1,000 megagrams of benzene annually. The Agency relies on the flow of benzene through two internal pieces of equipment in one process unit at the plant (namely, the main still

and the quence chamber in the acetic anhydride manufacturing process) in reaching that conclusion. As EPA sees it, that equipment in the Celriver Plant was not "designed to consume" benzene. Rather, the equipment was designed to "utilize" benzene as a quench and as a reflux agent in the manufacture of acetic anhydride. The acetic anhydride manufacturing unit of the plant was designed to use benzene as a quench by putting it into service in the quench chamber, and to use benzene as a reflux agent by putting into service in the main still. According to EPA, these two pieces of equipment in the acetic anhydride unit at the Celriver Plant were designed to put benzene into service at the rate of 1,517,700 megagrams per year. Because these rates exceeded the exemption threshold of 1,000 megagrams, EPA concludes that the Celriver Plant as a whole was designed to use more than 1,000 megagrams per year and, hence, did not qualify for the exemption.

Hoechst Celanese reads the exemption far differently. The Company agrees that the exemption is phrased in terms of a rate. Beyond that, however, EPA's and Hoechst Celanese's analyses diverge significantly.

At the very outset, Hoechst Celanese alleges that the Government's emphasis on the words "designed to use" is a litigation position embraced by the Government *post hoc*, and that the Government's explanation of the exemption can be found only in the papers it has filed in this litigation. As such, the Company contends, the "designed to use" argument is entitled to no deference from this court. According to the Company, "designed to use" merely indicates that a plant site's benzene usage is to be calculated on the basis of its maximum "design" or "nameplate capacity," rather than its "actual" capacity for any particular year. This is made clear, according to Hoechst Celanese, both from the context of the phrase as it is used in the exemption itself and from the rulemaking record.

Moreover, Hoechst Celanese argues, the Government's multiple counting explanation of the exemption strays far from any common understanding of the word "use." To illustrate, the Company gives the example of how much oil an automobile might be said to "use" in a year. An automobile that circulates several quarts of oil in its engine might plausibly be viewed as using either those several quarts of oil, or perhaps the amount of oil needed as "makeup" for that lost from the engine over the course of the year. Under multiple counting, however, the automobile would be said to "use" hundreds of thousands, if not millions, of quarts of oil per year.

Hoechst Celanese claims that, unlike the Government's multiple counting explanation, its interpretation of the exemption provision gives the word "use" its ordinary meaning. According to the Company, there are two dictionary definitions of the word that might apply in the context of the exemption: (1) to "expend or consume by putting to use," and (2) to "put into action or service: have recourse to . . .: to carry out a purpose or action by means of."[4]

At Celriver, Hoechst Celanese contends, the amount of benzene "used" in a year could thus mean either the amount of benzene the plant is designed to "use up" (*i.e.*, consume) over the course of a year, or the amount of benzene that the plant is designed to "utilize" or "put into service" over the course of year (i.e., the amount used up during the year plus the amount remaining in equipment at year's end). Either of these definitions is a "single counting" approach, the Company notes, contrasting them with the so-called "multiple counting" interpretation that the Government advances. The distinction is critically important, as it is not disputed that the Celriver Plant was exempt under either single counting interpretation.

---

[4] Hoechst Celanese's Initial Brief at 53 *quoting Webster's Third New International Dictionary*, p. 2523-24 (1976).

2. *The Administrative Record*

Both sides assert that the administrative record supports their respective reading of the exemption language. Hoechst Celanese argues that the administrative record establishes that the exemption is based on the single counting concept of plant nameplate capacity or consumption, terms that are wholly incompatible with EPA's multiple counting approach.

For its part, EPA relies on the administrative record to support its claim that its interpretation is consistent with the purpose of the exemption. Typically, that portion of the administrative record formally adopted by the EPA Administrator (*i.e.*, the Preamble and rulemaking documents incorporated by reference in the Preamble) is to be read in harmony with the language of the regulatory provision so as to provide guidance as to the Agency's true meaning. I turn, then, to an examination of the administrative record.

Deference to an agency's interpretation is particularly warranted when the interpretation harmonizes with the purpose of the statutory scheme and the purpose of the regulations. *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 369-72 (1973); *United States v. Unitank Terminal Service*, 724 F.Supp. 1158, 1165-66 (E.D. Pa. 1989) (interpreting the Benzene Leaks NESHAP).

One purpose of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . ." 42 U.S.C. § 7401(b). To fulfill this purpose, Congress required EPA to promulgate emission standards for hazardous air pollutants that protect the public with an ample margin of safety. 42 U.S.C. § 7412. EPA promulgated the Benzene Leaks NESHAP under this authority in order to protect the public from benzene that leaks from equipment, a type of pollution known as "fugitive emissions." EPA believed

that these controls would significantly reduce the incidence of leukemia for people living within twenty kilometers of leaking equipment. 49 Fed. Reg. 23,501 (June 6, 1984). As discussed below, the exemption was intended to reach only plants that were not cost-effective to regulate because they had few pieces of equipment and low emissions from leaking equipment.

EPA drafted the exemption in response to a comment that Benzene Leaks NESHAP proposed in 1981 was not cost-effective for some plants. EPA agreed that an exemption for such plants was appropriate. In a document supporting the final regulations, the agency wrote: "EPA believes it is reasonable to exempt plants from the standard when the cost of the standard is unreasonably high in comparison to the achieved emission reductions. Therefore, EPA decided to determine a cutoff for exempting these plants based on a cost and emission reduction analysis." Benzene Fugitive Emissions—Background Information for Promulgated Standards, EPA 450/3-80-032b ("BID"), at 2-104.

EPA performed a cost and emission reduction analysis by analyzing actual data from plants that produced ethylene, cumene, and vinyl acetate.[5] Based on its review of five data points provided by the three studied production facilities, PES plotted lines purporting to make correlations between cost-effectiveness and (1) the nameplate capacity of plants producing so-called "synthetic organic chemical manufacturing industry ("SOCMI") chemicals, (2) emissions from such facilities, and (3) the number of pieces of equipment at the facilities.

---

[5] EPA's description of this cost and emission reduction analysis appears in U.S. Mem. at Appendix B. The court notes that, while the PES Memo was part of the rulemaking record, it was not itself published in the *Federal Register*, nor were its contents fully explicated in the BID. Rather, interested persons had to be able to identify the PES memo as being relevant to the benzene exemption and could then obtain a copy only by writing to EPA and requesting it.

According to EPA, the data show a rough correlation between a plant's equipment count, emissions from leaking equipment, and plant production nameplate capacity, in that plants with higher production rates had more equipment and thus more fugitive emissions.

After assuming that the data it had derived from five data points was an accurate reflection of SOCMI production facilities generally, and by relating the data to benzene production plants, EPA's consultant plotted a correlation between plants with nameplate capacity producing 1,000 megagrams of benzene per year and benzene emissions of approximately 6 megagrams before regulation and emission reductions of about 4 megagrams after regulation. On the graph plotted by PES, emissions at these levels corresponded to plants having fewer than 87 pieces of equipment, such as valves, pumps, and pressure relief devices.

EPA determined that plants designed to use 1,000 megagrams of benzene per year would have approximately the same equipment count and emissions as plants that produced 1,000 megagrams of benzene annually. In the BID, EPA stated:

> For plants in which the benzene emission reduction achieved by implementing the standard is about 4 Mg of benzene per year, EPA has determined that the cost of achieving this emission reduction is unreasonable. In order to exclude plants on this basis, EPA selected a minimum cutoff of 1,000 Mg/year per plant site based on a benzene design usage rate or throughput.

BID at 2-105. The BID further explained that "[t]wo approaches for setting the [1,000 megagram per year] cutoff were considered: (1) number of sources at a plant site and (2) benzene usage per plant site." BID at 2-104. EPA said it rejected a "cutoff based on the number of sources at a plant site" because such a cutoff "could not

be applied readily" to small or intermittent users of benzene. *Id.* Rather, a cutoff "based on benzene design usage" was chosen "because it is easily understood and can be applied readily to a plant site." *Id.* The BID also indicated that it would be reasonable to exempt from the NESHAP plants emitting benzene in "significant quantities" when the "cost of the standard is unreasonably high in comparison to achieved emission reductions." BID at 2-104.

The Preamble to the Benzene Leaks NESHAP similarly explains that the exemption was based indirectly upon an analysis of equipment count and emissions. The Preamble states:

> EPA is exempting from the standard equipment at plant sites that are designed to produce or use 1,000 Mg/yr or less of benzene. This cutoff is based on the amount of equipment in a process unit and relates this amount to a design production rate. The 1,000 Mg/yr exemption would exclude most research facilities, pilot plants, and intermittent users of benzene from the standard.
>
> . . . .
>
> And finally, even though pharmaceutical operations that are designed to use benzene in excess of 1,000 Mg/yr are subject to the standard, they have substantial equipment inventories in benzene service, and, therefore, emit benzene in enough quantity to warrant coverage by the final standard.

49 Fed. Reg. 23,510 (June 6, 1984).

EPA contends that its position that the Celriver Plant did not qualify for the exemption is consistent with the purpose of the regulation. Unlike plants that EPA intended to exempt, EPA says, the Celriver Plant had thousands of pieces of equipment and high fugitive benzene emissions. Between June 1984 and February 1991, for example, the Celriver Plant operated almost 17,000 pieces

of equipment allegedly covered by the Benzene Leaks NESHAP. Between 1984 and 1993, the Celriver Plant's fugitive benzene emissions ranged between 69 and 226 megagrams annually. According to EPA's Toxic Release Inventory, the Celriver Plant ranked in the top 5% of all plants reporting benzene fugitive emissions in every year between 1987 and 1993.

EPA raises other arguments to support its claim of consistency with guidance in the administrative record on applying the exemption. In the BID, EPA drew a parallel between benzene use and benzene "throughput." According to EPA, the term throughput generally refers to the rate at which material is put through something, whether it be a system, a process, or a piece of equipment. Instead of looking at the "throughput" for the plant as a whole—which, as it explained below, Hoechst Celanese and its engineering experts contend is the only way for it to be consistent with the plant nameplate capacity element of the PES analysis and other aspects of the administrative record—the Government's multiple count approach would base eligibility on the throughput for one or more pieces of equipment inside the plant process. To accomplish this, EPA equates "throughput" with the term "processing rate," which, in turn, is more typically used when referring to the flow of material through a piece of equipment. This precise term, however, does not itself appear in the administrative record.

The BID states, "EPA selected a minimum cutoff of 1,000 Mg/year per plant site based on a benzene design usage rate or throughput. Throughput is determined by a mass balance during the design stages of process operations, accumulating all benzene processed in 1 year." BID at 2-15. This passage, EPA explains, describes both how throughput should be determined (by a mass balance),[6] and what benzene should be included (all benzene

[6] A "mass balance" is a technique based on the scientific principle that matter can never be destroyed. To apply a mass balance, one

processed in one year). The Government argues that the "mass balance" referred to in the BID was not intended to be conducted on the plant manufactuing process as a whole, but rather should really have been understood to contemplate one or more mass balances to measure the accumulated flow through pieces of equipment inside the plant manufacturing process selected by Agency staff after reviewing plant process diagrams.

Notwithstanding the fact that the term "processing rate" does not appear in the rulemaking record, EPA argues that the BID reiterates the connection between "use" and processing rate or throughput in several other places as well. In a summary section under the heading "Benzene Usage Cutoff," EPA stated:

> An analysis by EPA indicated that the cost effectiveness of the standard for equipment at plant sites processing less than 1,000 Mg/yr is unreasonably high. Because this cost is unreasonably high in comparison to the minimal emissions reduction, achievable, EPA provided an exemption for plants designed for low benzene usage.

---

accounts for all mass or material entering, leaving, and remaining in a defined area. Typically, the accounting of a material is expressed in a mathematical equation. When all material is accounted for, the equation "balances." While both EPA and Hoechst Celanese agree with this general definition of the term "mass balance," they disagree profoundly over the scope of the "defined area" on which this mass balance is to be performed under the exemption. At Celriver, EPA instructed Hoechst Celanese to provide benzene usage figures derived from mass balance calculations on individual process streams. The Company contends that both the plain language of the exemption and rulemaking record indicate that the mass balance is to be performed on the "plant site" as a whole. Such a calculation, Hoechst Celanese maintains, is specifically intended to eliminate any multiple counting resulting from internal flow. For most facilities that use benzene in their manufacturing process, it would generally result in the measurement of a plant's consumption.

BID at 1-10. In response to a comment that research and development plants should be exempt, the agency stated:

> a plant design usage rate or throughput rate of benzene equal to or less than 1,000 Mg/yr per plant has been selected as a cutoff. Based on the minimal amount of benzene processed at laboratory facilities and pilot plants, the 1,000 Mg/yr cutoff is likely to exempt most of these sources from the standard. Large-scale pilot plants or commercial tests might process more than 1,000 Mg/yr. If this happens, these plants would not have difficulty in achieving the standard since there are no major equipment requirements and the work practice requirements are reasonable, considering costs and emissions reductions available.

BID at 2-105. In response to a comment from a pharmaceutical company seeking an exemption, EPA stated:

> And finally, even though pharmaceutical operations with a benzene throughput in excess of 1,000 Mg/yr are subject to the standard, they have substantial equipment inventories in benzene service and, therefore, emit benzene in enough quantity to warrant coverage by the final standard.

BID at 2-91.

EPA relies on these passages in support of its view that the Celriver Plant was not exempt. EPA contends that the Celriver Plant was not exempt based on the flow rate of benzene through two pieces of equipment inside the manufacturing process—the quench chamber and main still. EPA obtained this flow from among the mass balances that Hoechst Celanese prepared, at EPA's direction, on various benzene streams in Celriver's internal processes to show those streams' "throughput," which the Agency then defined as meaning "total cumulative flow

through equipment in benzene service rather than net consumption." [7]

Some parts of the administrative record provide support for the Defendant's "consumption" interpretation. Chief among these is a paragraph from the Administrator's Preamble which uses the word "consumed" or "consumption" four times, and appears to use the concept synonymously with the word "use". This paragraph reads as follows:

> The possibility that pharmaceutical operations could be adversely affected by the standard is very small. This is true for several reasons. First, most pharmaceutical plants use very little benzene. According to estimates contained in *Market Input/Output Studies —Benzene Consumption as a Solvent . . .*, 1978 benzene consumption by pharmaceutical manufacturers was about 0.72 Gg [gigagrams]. No companies consumed more than 1,000 Mg/yr in 1978. The commenter states that they consumed about 325 Mg/yr during 1981. Thus, it is unlikely that pharmaceutical operations would be affected by the standard because the final standard exempts equipment at plant sites that are designed to produce or use 1,000 Mg/year or less of benzene. Second, benzene consumption by the pharmaceutical industry is declining rapidly.

49 Fed. Reg. 23,510 (June 6, 1984) (emphasis added).

In its brief the government explains that the placement of the words "consumed" and "consumption" in close proximity with the word "use" in both the Preamble and the

---

[7] Elsewhere in this same communication, the Agency observed that it "may be time-consuming to calculate actual annual benzene usage as interpreted by EPA," and indicated that the Agency "would be willing to review any estimation methods [Hoechst] Celanese might use in formulating a response" to the Agency's request. "Any response that relies that on estimation methods," EPA continued, "should contain enough backup information to allow us to evaluate the method used and the results obtained with it."

BID is 'accidental" and that EPA could have drafted these passages "more exactly".

Hoechst Celanese contends that the Preamble indicates that EPA intended to exempt small users of benzene, but EPA's multiple counting interpretation would virtually eliminate the exemption in even the simplest and smallest of recycle operations. Hoechst Celanese asserts, for example, that a research facility that intermittently recycles one gallon of benzene through an aquarium pump at a design flow rate of one gallon per minute would not be exempt.

Additionally, the precise term "processing rate," (the term relied upon by some EPA staff as the basis for a multiple count interpretation) is not mentioned anywhere in the record. Hoechst Celanese argues that EPA adopted nameplate capacity and specifically rejected "processing rate," a version of multiple counting, as unsuitable for this type of exemption. Moreover, it cites to a parallel EPA rulemaking to establish other standards for the synthetic chemical manufacturing industry where the use of that term was specifically rejected because it was "difficult to establish." The government argues that although the words "processing" and "rate" do not appear together in the BID, the BID does describe the scope of the exemption in terms of the rate at which benzene is processed.

Hoechst Celanese also points to the 1980 BID which listed the types of processes which were being considered for benzene regulation. The listed processes included those that produced benzene (refineries) and those that used benzene in the production of benzene derivatives. The 1980 BID had information on 133 sites, but did not list any of Hoechst Celanese's plants, some of which had been operating for decades.

These passages from the record, however, do not lead inevitably to the conclusion that EPA intended the word "use" in the exemption to mean only "consume." As the

Defendant concedes, a mass balance can be used to determine the flow of benzene through equipment. The Defendant prepared such a mass balance for EPA in order to show the flow of benzene through various parts of its plant, including the quench chamber and main still. Benzene throughput sometimes refers to a plant's benzene consumption, but the words "throughput" and "consumption" are not synonymous. The word "throughput" can describe, for example, the flow of benzene through equipment like the quench chamber and main still. Furthermore, EPA maintains that the Defendant has not shown how its consumption interpretation squares with the purpose of the Benzene Leaks NESHAP, which according to EPA was to control fugitive benzene emissions at all plants except those with few pieces of equipment and low emissions.[8] In sum, the passages cited by the Defendant from the administrative record do not establish that EPA's interpretation is plainly erroneous.

The court concludes that EPA's interpretation of the regulation is permissible and should be sustained by the court. Although Hoechst Celanese's interpretation of the regulation is also reasonable, the court must "refer to the reasonable judgment of the agency to which Congress has entrusted the development of rules and regulations to ensure [the protection of the environment]." *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C.Cir. 1995). EPA's interpretation of 40 C.F.R. § 61.110(c)(1) is not "plainly erroneous or inconsistent with the regulation." *Tally v. Mathews*, 550 F.2d 911, 919 (4th Cir. 1977).

3. *The "Application" Argument*

EPA's other argument is that Hoechst Celanese never applied for the exemption it now claims for itself. Hoechst Celanese contends, on the other hand, that the exemption is self-implementing because the plain language of Section

[8] The Benzene Leaks NESHAP also exempts coke byproducts plants. 40 C.F.R. § 61.110(b).

61.110(c)(2) provides that a plant designed to use less than 1,000 megagrams of benzene per year "*is exempt* from the requirements." 40 C.F.R. § 60.110(c)(2) (emphasis added).

Courts look to the language and design of the whole law when construing the meaning of particular phrases, *U.S. Nat. Bank of Oregon v. Independent Ins. Agents*, 113 S.Ct. 2173, 2182 (1993), and avoid constructions that render words superfluous. *Ratzlaf v. United States*, 114 S.Ct. 655, 659 (1994). The paragraph containing the exemption begins, "[i]f an owner or operator applies for one of the exemptions in this paragraph . . . ." 40 C.F.R. § 61.110(c)(1). Elsewhere, the NESHAP requires that applications made pursuant to Part 61 should be sent to the appropriate EPA regional offices. 40 C.F.R. § 61.04.

The criteria that must be met for the exemption is specified in 40 C.F.R. § 61.110(c)(2). The regulatory language does not give EPA discretion in determining who qualifies for the exemption; a plant qualifies for the exemption if it meets the criteria set forth in the regulation. EPA still maintains, however, that this lack of discretion, does not make an application unnecessary.

The word "apply" in the regulation cannot be ignored. The EPA acknowledges, however, that the regulation does not specify the content of an application, nor does it give any real guidance as to an application procedure. Hoechst Celanese maintains that the regulation is self-executing and that the EPA has advanced the application argument only for the purposes of litigation and that in actual practice, the regulated community has not been applying for, nor have they been required to apply for this exemption. Hoechst Celanese also argues that key EPA staff have confirmed that there is no obligation to apply for the exemption.

EPA acknowledges that the ordinary meaning of the verb "apply" in 40 C.F.R. § 61.110(c)(1) means at least

that plants seeking the exemption must "communicate" their request to EPA.[9] Because of this, an examination of the communications between EPA representatives and the Company after promulgation of the NESHAP in 1984 is appropriate. The relevant facts, derived from the undisputed evidence in the record, are as follows.

In 1984 Hoechst Celanese operated two Texas plants that recycled benzene: the Bishop and Pampa Plants. Following the June 1984 promulgation of the NESAP, Hoechst Celanese undertook to determine the scope of the "use" exemption. The initial evaluation was made by Jaime Garza, a senior environmental engineer at Bishop. Mr. Garza considered a full range of regulatory interpretations—both plausible and implausible. He also asked for a review of the matter by in-house counsel, who evaluated the rulemaking record including the regulatory Preamble and the BID. After these evaluations, Mr. Garza concluded that "use" meant "consumption" and that Bishop was exempt because it consumed less than 1,000 megagrams per year of benzene.

On August 31, 1984, Mr. Garza wrote a letter seeking confirmation of Bishop's exempt status from the Texas Air Control Board (TACB), the agency to which EPA had delegated the authority to implement and enforce the benzene NESHAP in Texas.

Mr. Garza provided the TACB a detailed breakdown of annual bezene consumption and purchases for Bishop. His letter and attachments showed that Bishop recycled benzene and that its total consumption and purchases of benzene for each of the prior six years were less than 1,000 megagrams.

In response to Mr. Garza's letter, another TACB representative (Mr. Rodgers) informed Mr. Garza about an

---

[9] The definition of the verb "apply" includes, "To ask or seek aid, employment, or admission." *Webster's II New Riverside University Dictionary.*

August 20, 1984 letter sent from EPA Region VI (EPA's regional office for Texas) to a Texaco Chemical Company facility in that same EPA Region. The letter to Texaco said that the term "use" was "not meant to imply consumption," but rather was "meant to reflect the overall quantity of benzene used in equipment at a facility," and that the "total quantity in use at a facility needs to be considered" not just consumption.

After receiving a copy of that letter in September 1984, Mr. Garza called the TACB and discussed the matter with Mr. Palmer, the director of the TACB region responsible for the Bishop Plant. After reviewing the Texaco letter and checking with EPA, the TACB told Mr. Garza that the TACB wanted additional information regarding the amount of benzene "kept at the Bishop Plant site at any point in time." In response, on October 22, 1984, Mr. Garza sent another letter to the TACB, explaining that the maximum amount of benzene present at Bishop, both in equipment and storage, was less than 1,000 megagrams a year.

Before responding to Mr. Garza's letters, Sabino Gomez, then Director of TACB's Compliance Division, conferred with EPA Region VI about EPA's interpretation of the word "use" in the exemption. From those conversations, Mr. Gomez understood that EPA interpreted the exemption to be based not on benzene consumption at a plant site, but rather on what a plant's inventory of benzene was. Mr. Gomez also specifically asked EPA Region VI "whether 'designed' is the key word in this rule." EPA Region VI staff, after consulting with EPA's Office of Air Quality Planning and Standards in North Carolina, informed Mr. Gomez, "design capacity, irrespective of actual use, is the operating factor." [10]

---

[10] The government has not set forth any evidence which indicates that EPA told Mr. Gomez or anyone else at the TACB that "designed to use" was to be interpreted consistent with the multiple counting approach.

On the basis of those conversations with EPA and based on the information in Mr. Garza's August and October 1984 letters, the TACB confirmed—by letter of December 7, 1984—that Bishop was exempt from the benzene NESHAP. Significantly (for purposes of this litigation), as soon as Hochest Celanese received the confirmation letter from the TACB, it circulated the information to company personnel whose responsibilities included the Celriver Plant.

TACB sent EPA a copy of the December 7, 1984 letter confirming the exempt status of the Bishop Plant. After receiving the letter on December 21, 1984, EPA did not seek further information from either the TACB or Hoechst Celanese, nor did EPA indicate that it disagreed with the TACB's confirmation of the exempt status of a plant that recycled benzene as Bishop (and Celriver) did.

During this same period, Hoechst Celanese was also evaluating the terms of the exemption for its Pampa Plant. Like Celriver and Bishop, Pampa then recycled benzene continuously through a closed-loop system. Unlike Celriver and Bishop, however, in 1984 Pampa was consuming more than 1,000 megagram of benzene per year. Consequently, in September 1984, the Pampa Plant applied to the TACB for a two-year waiver from compliance with the benzene NESHAP so that the plant could become exempt from the benzene NESHAP by reducing "the quantity of benzene *consumed* in the plant to less than 1,000 megagrams." The TACB approved the waiver request for Pampa on April 9, 1985, stating that if benzene consumption were reduced to 1,000 megagrams per year by June 1986, the exemption would apply. Copies of both the waiver request and TACB approval were sent to EPA Region VI.

In June 1986, the Pampa Plant reported to the TACB that the facility had reduced its benzene consumption to less than 1,000 megagrams per year and was therefore

entitled to the exemption. The Company provided EPA Region VI with a copy of the letter. On December 9, 1986, EPA Region VI inspector George Marusak conducted a compliance monitoring inspection at the Pampa Plant, during which he and the TACB evaluated whether Pampa was in compliance with the benzene NESHAP. Dr. Marusak's Compliance Monitoring Report concluded that Pampa was exempt because it had reduced its "consumption of benzene to less than 1,000 Mg per year." This report was received and approved by Dr. Marusak's supervisors at EPA Region VI.[11]

As discussed later in this opinion, the Company did not communicate with EPA about an exemption specifically for the Celriver Plant until 1989. The facts reveal, however, that it was confirmed to the Company by EPA representatives that Hoeschst Celanese's other plants which used benzene in identical processes were exempt. Although the Company did not *formally* apply to the EPA for an exemption for Celriver, it did so indirectly through its communications with EPA regarding its Texas plants, which used essentially the same process as Celriver. Therefore, the court declines to accept the EPA's assertion that a formal application was a necessary prerequisite to qualifying for the exemption and concludes that the communications with EPA were sufficient to qualify for an exemption for the Celriver Plant.

IV.

The second issue before the court is whether Hoechst Celanese received fair notice of the government's interpretation of the benzene NESHAP exemption, as required under constitutionally based principles of due

[11] In addition to these two Texas plants, Hoechst Celanese also operated the Celco Plant in Virginia. In 1984, Virginia's State Air Pollution Control Board confirmed that the Celco Plant was exempt from the NESHAP based on a single counting of benzene at the plant site.

process. Hoechst Celanese is not liable and is not subject to penalties if the multiple counting interpretation described and deferred to above[12] is not "ascertainably certain" from the regulatory language and the Administrator's statements in promulgating the rule. *See General Electric*, 53 F.3d at 1328-29, 1333-34. For the reasons discussed below, the court determines that Hoechst Celanese is not liable and is not subject to penalties.

A. *The "Fair Notice" Standard*[13]

Where an agency has provided no pre-enforcement warning of its interpretation, the question facing a reviewing court is "whether the regulated party received, or

---

[12] During the past 12 years, the government has provided several different, inconsistent articulations and applications of a multiple counting approach. Hoechst Celanese argues that none of those is a cogent explanation of how to apply a multiple counting approach in a manner that will consistently provide the same result at the same plant. In fact, although the government has calculated Celriver's "use" of benzene based on the benzene flow through two specific internal pieces of equipment at that plant, it is not clear why the government chose those particular pieces over the many other flanges, valves, and other pieces of equipment in benzene service at Celriver.

[13] The government contends that Hoechst Celanese is in actuality asserting a defense of estoppel. It is well-settled that estoppel generally does not run against the United States. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). This principle is grounded on the separation of powers doctrine. *U.S. v. Marine Shale Processors*, 1996 WL 185815 (5th Cir. 1996). ("Judicial adoption of estoppel based on agency misrepresentation would . . . vest authority in [government] agents that Congress would be powerless to constrain.") "Fair notice" on the other hand, is a principle rooted in the due process clause of the United States Constitution. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (The due process clause "prevents deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires."). In determining that Hoechst Celanese should not be sanctioned in this case, the court relies on the fair notice doctrine, not principles of estoppel.

should have received, notice of the agency's interpretation in the most obvious way of all: by reading the regulations." *General Electric Co.*, 53 F.3d at 1329. Fair notice is not provided unless a regulated party acting in good faith is able to identify with "ascertainable certainty," on the face of regulations and other public statements issued by the agency, the standard to which the regulating agency expects it to conform. *Id.* Without such fair notice, the regulated entity does not commit a wrong when it fails to meet the regulatory standard.

Unclear or ambiguous regulations do not provide the requisite notice. If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express. *Gates & Fox*, 790 F.2d 154, 156 (D.C. Cir. 1986), *quoting Diamond Roofing Co. v. OSHRC*, 528 F.2d 645 (5th Cir. 1976). The test is "not what [the agency] might possibly have intended, but what [was] said." *U.S. v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) (brackets in original).

A regulated party may also be found to have been given fair notice of the agency's interpretation in those situations where, prior to the commencement of enforcement efforts, the regulated party was given actual notice of the interpretation. *See General Electric. Co.*, 53 F.3d at 1329. However, such notice must be an "authoritative interpretation of the regulation" from the regulating agency. *Gates & Fox Co.*, 790 F.2d at 157.

Particularly compelling evidence that fair notice of a rule has not been given exists where the agency itself has not provided a definitive or consistent reading of the regulation. *See, e.g., General Electric Co.*, 53 F.3d at 1332; *Diamond Roofing Co.*, 528 F.2d at 649. When the "agency itself is uncertain of the meaning of its regulation" and "agency personnel give conflicting advice to private parties about how to comply with it," it is "arbitrary

to find the regulation 'clear.'" *Rollins v. Envtl. Services v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991).

Due process concerns are clearly raised when unpublished "clarifying" interpretations cause the regulatory language and published guidance to be misleading. Misleading regulatory language, even if "clarified" with the best of intentions, is itself an ongoing cause of noncompliance and confusion. Unlike the unpublished clarification, the official language is clearly authoritative and available to the public. Only the agency can amend the regulation and publish guidance when correcting an "accident" to ensure that they clearly communicate the meaning that will be enforced. Awarding penalties where the problem is the language chosen by the agency, rather than any unwillingness to comply would only "delay the day when . . . regulations will be written in clear and concise language" so that regulated parties "will be better able to understand and observe them." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976).

B. *Information in the Regulatory Record*

Even though the court has deferred to the EPA's interpretation of the NESHAP exemption as permitting a multiple counting of recycled benzene, the court believes that the regulatory record in this case[14] does not provide fair notice of that interpretation. Indeed, Hoechst Celanese has provided numerous examples of ways in which rule-

---

[14] The record includes the rule itself, the Preamble, and documents referred to and incorporated into the Preamble as part of the Administrator's further description and interpretation of the regulation. *See* 5 U.S.C. § 551(4) (definition of "rule" in the APA); 44 U.S.C. § 1507(4) (contents of the *Federal Register* "shall be judicially noticed"). Never having been superseded by a subsequent rulemaking, the Preamble is as much a current statement of what the regulation means today as it was when the benzene NESHAP was published on June 6, 1984. It provides evidence of the Administrator's intent. *See State of Vermont v. Thomas*, 850 F.2d 99, 103 (2nd Cir. 1988).

making record statements fail to give notice of a multiple count meaning. These examples and the court's analysis thereof, have been set forth on pages 19-21 of this memorandum opinion and order.

Additionally, Hoechst Celanese provides an affidavit from Robert Ajax, Chief of the EPA unit that actually developed the benzene NESHAP. Mr. Ajax states that EPA chose to have the exemption on benzene "use," based on single counting, because it was an easy-to-apply surrogate for the cost-effectiveness policy that EPA wanted the exemption to implement. It is "unequivocally clear," Mr. Ajax says, that "internal recycle"—*i.e.*, multiple counting—was never "considered [n]or suggested as the basis for the NESHAP exemption."

Similarly, the rulemaking record is inconsistent concerning EPA's claim that a multiple counting approach would ensure that facilities with low fugitive emissions or few pieces of equipment in benzene service would be exempt while those with higher emissions and more equipment would be subject to the NESHAP. As noted in Attachment F of Hoechst Celanese's Initial Brief, under the government's approach, some very large emitters of benzene would be exempt and some plants with very low emissions and very few pieces of equipment in benzene service would not be exempt.

In addition, the rulemaking record is somewhat inconsistent as to EPA's claim that it intended to exempt only small sources. The Preamble shows that EPA also intended to exempt users of small amounts of benzene—a category that would include all those that recycled benzene as a solvent or quenching agent, as was done at Hoechst Celanese's Celriver Plant and at the pharmaceutical facility described by—and declared to be exempt in—the NESAP Preamble, 49 Fed. Reg. 23510 (June 6, 1984).[15]

---

[15] According to Hoechst Celanese, when EPA was developing its benzene NESHAP, refineries and feedstock users of benzene pro-

In this regard, the court also finds compelling that in the months (and years) following promulgation of the NESHAP, because of the confusion precipitated by EPA staffers' conflicting internal communications, various EPA offices understood the exemption in a variety of different ways.[16] In fact, the record in this case establishes that on various occasions from 1984 through at least 1990, EPA advised some facilities that they were exempt based on a single counting of recycled benzene and in other cases, EPA did not dispute state exemption decisions based on single counting. If the rulemaking record did not give EPA staffers notice of a multiple counting interpretation, it cannot reasonably be said that Hoechst Celanese should have understood that to be what the Administrator meant.

The court concludes from all this that although the multiple counting approach is reasonable enough to be sustained when deference is given to the government's present interpretation, the regulatory language and administrative record do not afford sufficient notice of the EPA interpretation.

C. *Actual Notice from Events in 1984-1986*

EPA argues that, apart from anything contained in the public record, Hoechst Celanese had *actual notice* that EPA was interpreting the benzene NESHAP exemption as requiring a multiple counting of recycled benzene. According to EPA, this defeats Hoechst Celanese's reliance on a "fair notice" defense. EPA's actual notice argu-

---

duced or consumed millions of megagrams of benzene annually. In contrast, those that recycled benzene as a solvent or quenching agent —as Hoechst Celanese's Celriver Plant did—collectively used or consumed a total of only 1,500 megagrams annually.

[16] Hoechst Celanese points out that at least some of that confusion was generated by EPA staff's issuance of guidance documents that contradicted the Administrator's clear language in the benzene NESHAP Preamble (calling for single counting) and tried to develop alternative approaches.

ments are based largely on the previously described events that occurred in Texas after promulgation of the NESHAP, in particular Hoechst Celanese's receipt of a copy of the Texaco letter, which stated that the word "use" was to mean the "total quantity in use at a facility." [17] Although the Texaco letter cannot reasonably be said to have provided Hoechst Celanese with actual notice that its benzene usage was to be determined by multiple counting,[18] EPA argues that the Texaco letter did give Hoechst Celanese notice that the Agency did not intend to equate "use" with "consumption" and that, in turn, should have prompted Hoechst Celanese to ask EPA staff—rather than the TACB—whether its plants were exempt. Instead of seeking such confirmation, the government suggests that Hoechst Celanese chose to remain ignorant of EPA's reading of the regulation.

The court disagrees. This argument ignores that Hoechst Celanese sought—and received—confirmation of the exempt status of its plants from both State regulators

---

[17] The government attaches significant weight to a handwritten phrase at the top of Hoechst Celanese's copy of the Texaco letter which stated "Read it and Weep". The words were written by Mr. Garza and the memo was sent to Jim Mullins, Garza's counterpart at Hoechst Celanese's Pampa Plant. The government maintains that this comment is affirmative proof that Mr. Garza knew that EPA had adopted the multiple counting approach. After reviewing this letter as a whole, the court declines to make this bold presumption. Rather, the court finds that the most plausible explanation for this comment was that Mr. Garza read this letter to mean that the EPA might be reading the exemption as calling for an evaluation of the overall quantity of benzene used at a plant—that is, the plant's consumption of benzene plus the amount of benzene in service at the plant. Mr. Garza testified that he believed this approach would not affect his plant, but would affect Mr. Mullins' Pampa Plant and thus, would require his colleague to work harder.

[18] Hoechst Celanese points out that according to the testimony of both the author of the EPA Region VI letter and the recipient of that letter, neither read it as saying that "use" is to be determined based on a multiple counting benzene at a plant site.

and EPA Region VI. In fact, Hoechst Celanese received a copy of the Texaco letter only because the Company went to the appropriate agency (the TACB [19]) and asked it to confirm the exemption's applicability. TACB responded to Hoechst Celanese's inquiry only after first conferring with EPA about the matter.

Nor does the court find merit in EPA's argument that the TACB's reading of the regulation was irrational and thus should have prodded the Company to seek further guidance from EPA. The TACB's single count application of the Texaco letter—although not based on just consumption—was still consistent with a single count "nameplate capacity" concept, which the NESHAP rulemaking record suggests may be the basis of the exemption.[20]

Other government arguments that the TACB's interpretation was invalid are not relevant here. The TACB was not saying that it advocated that interpretation. Rather, as explained by Mr. Gomez in his affidavit and by Mr. Garza in his deposition, the TACB was simply stating the interpretation that it thought was being advocated by EPA staff. The court finds unreasonable EPA's suggestion that Hoechst Celanese had an affirmative obligation to question its exempt status further when its plants were exempt based on (1) a "use equals consumption" reading of the rule, (2) an alternative ("use equals inventory") reading which both the TACB and Hoechst Celanese believed to be how EPA was reading the rule, and (3) any other

[19] As noted above, EPA had delegated to the TACB the authority to address these issues. The TACB did so, continually informing EPA what it was doing. There is nothing in the record to indicate that EPA at any time advised the TACB—or Hoechst Celanese—that the TACB's actions were improper as to either the Bishop or Pampa Plants.

[20] TACB had before it information reflecting not just consumption, but the "overall quantity of benzene" physically available to be used in one year—the amount on site at the beginning of the year plus all benzene added during the year to make up for consumption.

reading of the exemption that called for a single counting of benzene at a plant site. The whole point of the "fair notice" line of cases is that, as a matter of due process, the regulatory obligations to which persons are subject flow from what the regulations themselves say, with ascertainable certainty. Companies are not obliged to seek "clarifications" from agency staff of every conceivable ambiguity that might be lurking in regulatory language. An "actual notice" argument can be predicated only upon notice that Hoechst Celanese actually received, not upon notice it might have received if it had continued to make unlimited additional inquiries.

The court also finds compelling that even if Hoechst Celanese had asked more individuals within EPA about the meaning of the exemption, it is far from clear that the Company would have been told about EPA's multiple counting interpretation of the rule. As noted above, because of confusion generated in large part by internal memoranda from EPA staffers seeking to implement a multiple counting approach, EPA's regional offices were inconsistent as to how the regulation should be applied and, on various occasions from 1984 through at least 1990, told inquiring companies that the exemption was to be based on a single counting of recycled benzene.

D. *Evaluating Actual Notice After Commencement of Enforcement Against the Celriver Plant*

Finally, the Government argues that Hoechst Celanese cannot rely on its "fair notice" defense for any violations that occurred after the summer of 1989, when EPA Region IV (EPA's regional office in Atlanta) sent letters to the Celriver Plant concerning its compliance with the benzene NESHAP. The facts relevant to this argument, again derived from undisputed record evidence, are the following.

In June 1989, EPA Region IV sent a letter to Hoechst Celanese, stating that Celriver "may be subject" to the

benzene NESHAP and asking for information on Celriver's benzene "throughput on an annual basis." The letter defined "throughput" as the "total cumulative flow through the process rather than net benzene consumption or usage." Hoechst Celanese replied on June 26, 1989, reporting that Celriver was exempt because the plant's consumption of benzene was far less than 1,000 megagrams annually.

On August 18, 1989, in reply to Hoechst Celanese's June 26 letter, EPA Region IV sent a second letter stating, "it appears that you are unaware of EPA's interpretation of benzene usage as the term is used to determine applicabiilty . . . ." Attempting, in its words, "to clarify what is meant by benzene usage," EPA gave an example of how to calculate usage in a closed-recirculation system. In the example, benzene was considered "used" each time it was recycled. The letter indicated that this "interpretation of the term benzene use" was "based upon EPA Headquarters guidance provided shortly after [the benbene NESHAP] was promulgated" and that the basis for whatever was in that guidance (copies of which were not provided to Hoechst Celanese) was in the Agency's final BID.

In a September 1989 cover letter indicating that it did not then agree that multiple counting was a part of the benzene NESHAP exemption, Hoechst Celanese nevertheless provided the "throughput" calculations in the manner that Region IV had requested, by using flow rates at several points inside the process. This produced a Region IV-requested "throughput" calculation of over 2.5 million megagrams of benzene per year—a number that was orders of magnitude higher than the amount that the Celriver Plant ever had on site. While awaiting a response from EPA, Celriver also began work to determine what would need to be done to implement the NESHAP at the Celriver Plant if that was determined to be necessary.

On February 20, 1990, EPA Region IV sent the Celriver Plant a formal notice that EPA considered that plant to be in violation of the benzene NESHAP "based upon information provided by the [Celriver Plant] in response to EPA letters . . . dated June 13, 1989 and August 18, 1989." The Company set up a meeting with Region IV to discuss the exemption interpretation. At that April 1990 meeting, the Company affirmed that although it continued to believe Celriver was exempt, it would meet the terms of the benzene NESHAP at the Celriver Plant.

EPA Region IV then asked for—and within a few days received from Hoechst Celanese—the schedule that Hoechst Celanese intended to follow in meeting the terms of the NESHAP at Celriver. That schedule showed that while Hoechst Celanese could have implemented the NESHAP between 1990 and 1992 at a cost of between $2 and $3 million, the Company planned another much more expensive—approach, parts of which could be implemented more promptly. Specifically, Hoechst Celanese described a program to phase out the use of benzene entirely at one of its processes in less than one year, at an additional cost of $8 million. Hoechst Celanese estimated that it would be able to meet all remaining terms of the NESHAP no later than December 31, 1992.

The Celriver Plant then met the terms of the NESHAP by September 1991—*i.e.*, within approximately eighteen months of the time that Hoechst Celanese gave its compliance schedule to EPA and within approximately two years of the time the Government contends the Company was given actual notice of EPA's interpretation.[21] Later

---

[21] By August 1991, the Company believed that it had implemented all the terms of the NESHAP except for one pressure relief device, which Hoechst Celanese apparently did not begin operating in conformity with the NESHAP until the following month. Following that time, as explained by counsel for Hoechst Celanese during oral argument, Hoechst Celanese conducted a voluntary environmental audit at Celriver to determine if all plant equipment in benzene service was meeting the terms of the NESHAP. As a

Celriver completely phased-out benzene usage at a cost of more than $40 million.

Based on these facts, the court concludes that it is inappropriate to find Hoechst Celanese liable or to impose penalties for actions it took between 1990 and 1992. The court bases this conclusion on several factors.

First, the court concludes that Hoechst Celanese did not have actual notice of EPA's multiple counting interpretation in the summer of 1989. The interpretation in the letters from EPA Region IV were, after all, contrary to statements in the Preamble and contrary to the interpretations of the exemption that the Company had received from EPA Region VI, and state agencies in Texas, and Virginia. Thus, even if Hoechst Celanese may have known from its correspondence that individuals in the Atlanta regional office were then subscribing to a multiple counting interpretation of the exemption, Hoechst Celanese had a legitimate basis for believing that EPA's Region IV office was not speaking for the Administrator. In fact, the multiple counting reading of the exemption was not an authoritative reading even within Region IV since, during the same time period, other individuals within EPA Region IV were interpreting the exemption as calling for a single counting of benzene at a plant site.[22] Hoechst Celanese could not have been put "on notice" that EPA had adopted a multiple counting interpretation

---

result of that self-audit, Hoechst Celanese discovered a single valve (out of a total of 174) that was not meeting the terms of the NESHAP; the Company replaced that valve by August 1992. The court concludes that Hoechst Celanese's treatment of this single valve does not warrant a finding of liability. Whatever the explanation, even this task was completed before the December 1992 deadline specified in the compliance schedule which Hoechst Celanese submitted to EPA.

[22] On June 26, 1989, EPA Region IV concluded that the U.S. Department of Energy's Savannah River facility (which recirculated benzene) would be exempt based on a its " 'design' benzene consumption rate."

when, at the same time, the Agency itself was not consistently embracing such an interpretation.

Similarly, this court concludes that none of EPA Region IV's communications with Hoechst Celanese—up to and including the issuance of a notice of violation (NOV) on February 20, 1990—can be deemed as having provided Hoechst Celanese an authoritative interpretation of the benzene exemption, when that interpretation is contradicted on its face by the language used by the Administrator in promulgating the final rule and was not communicated to Hoechst Celanese by the Agency as a whole.[23] Even though the court today concludes that the multiple counting interpretation is a "permissible" reading of the benzene exemption, that ruling does not reach back in time to establish that multiple counting was the Agency's consistently held interpretation in 1989, 1990, or even in 1992, by which time the Celriver Plant was meeting all the terms of the benzene NESHAP.

In any case, this court need not decide whether (and, if so, when) Hoechst Celanese was given authoritative actual notice of the Agency's present interpretation. For even if Hoechst Celanese received actual notice, it is undisputed that Hoechst Celanese acted responsibly to meet —and far exceed—the terms of the NESHAP in advance of EPA-accepted deadlines. In fact, by spending an additional $8 million, it did so within the two-year compliance period that was available to qualifying sources under the waiver provisions in the NESHAP.

It is also undisputed that EPA never objected to the compliance schedule submitted by Hoechst Celanese in

---

[23] Hoechst Celanese has pointed out that just one week after EPA Region IV issued its NOV for the Celriver Plant, EPA gave another company a conflicting single count interpretation of the exemption. A February 28, 1990 EPA Region VI inspection report for the Howell Hydrocarbons facility (which recycled benzene in a manner similar to that at Celriver) indicated that facility was exempt from the benzene NESHAP because less than 1,000 megagrams per year of benzene was "purchased as make-up material."

April 1990. This is significant because had EPA at any point wished to compel Hoechst Celanese to meet the terms of the benzene NESHAP more expeditiously, it had options at its disposal that it never exercised.[24] In such circumstances, where Hoechst Celanese never conceded that it was subject to the NESHAP but nonetheless agreed to implement the requirements of the rule and where EPA never objected to—or took steps to shorten—the compliance schedule that Hoechst Celanese submitted, fundamental considerations of fairness argue against a finding of liability for that time period.

Underscoring this conclusion is the fact that the Clean Air Act did not contemplate immediate compliance with the benzene NESHAP. Section 112(c) of the Act—as it read at the time of promulgation of the benzene NESHAP—specified that those subject to a hazardous pollutant emission standard had 90 days from the effective date of the rule to come into compliance. This 90-day period, though, could be extended for up to an additional 21 months (a total of two years) upon satisfaction of the standards for a waiver. EPA's benzene NESHAP contains provisions mirroring the statute's two-year waiver requirement. *See* 40 C.F.R. § 61.11.

In summary, had the benzene exemption provided fair notice that the Celriver Plant was not exempt when the rule was first promulgated, the Company would have been able to apply for and likely obtain a waiver for Celriver—as it did for its Pampa Plant—giving it up to two years in which to come into compliance. And, the facts show, the plant would have been able to come into compliance within a two-year period. It was not the Company's fault that the opportunity to obtain a waiver may have passed by the time Hoechst Celanese was finally given actual no-

[24] For instance, EPA could have issued an administrative order pursuant to § 113(a) of the Clean Air Act or the Agency could have pursued a civil enforcement action for an injunction under § 113(b).

tice by EPA that the Celriver Plant was not exempt.[25] The Company's efforts to meet the terms of the NESHAP should be evaluated in light of the additional time for compliance to which it would likely have been entitled in 1984.

In light of the above facts, due process precludes a finding of liabiilty in this case. As one of EPA's own administrative law judges aptly put it:

> In order to continue to enjoy the confidence of the regulated community, the public, and the courts in the conduct of its enforcement activities, the government must "occasionally bear the consequences of unclear wording in the extensive and detailed implementing regulations for its statutory responsibilities. This should be regarded as a small price to pay for the maintenance of credibility and public trust, and for a reputation of fairness in dealing with the regulated community."

---

[25] During oral argument, counsel for the government disputed whether the Celriver Plant would have qualified for a waiver, suggesting that waivers were not available for coming into compliance with leak detection and equipment tagging requirements. This ignores that Hoechst Celanese submitted to EPA, in April 1990, a comprehensive and coordinated plan for going beyond the terms of the benzene NESHAP and phasing out the use of benzene altogether in one of two process units at Celriver. Even if the court were to assume that extensions of time in order to comply solely with the leak detection and equipment tagging requirements were not generally contemplated under the waiver provision, the court is unwilling to conclude that the Agency would have been without discretion to grant Hoechst Celanese a waiver for the time necessary for the Company to implement its overall compliance plan, which included the additional environmental benefit of eliminating the plant's use of benzene in one process. *Cf. Monsanto Co. v.* EPA, 19 F.3d 1201, 1207 (7th Cir. 1994) (The Clean Air Act's "waiver" provision does not require the source to install the controls that will achieve compliance at the earliest possible date," and if a company "has a choice between two control strategies, the EPA has authority to grant a waiver for a pollution prevention strategy even if that strategy would take slightly longer to implement than a less desirable strategy.").

In Re Phibro, 1994 CAA LEXIS 18 (Oct. 5, 1994) (Ex. 110), *quoting In the Matter of K. O. Mfg., Inc.*, Docket No. EPCRA-VII-89-T-611 at 17 (Feb. 28, 1993).

Conclusion

For all of the foregoing reasons, the court hereby determines that the EPA's interpretation of 40 C.F.R. § 61.110 (c)(2) is permissible and that interpretation is hereby sustained by the court. The government's motion for summary judgment is granted to this extent only. The court also grants, in part, the motion for summary judgment by Hoechst Celanese Corporation, awarding no civil penalty to the plaintiff because Hoechst Celanese did not receive fair notice of the EPA interpretation during the time period it was using benzene at the Celriver Plant. Each side shall bear its own costs.

IT IS SO ORDERED.

/s/ Joseph F. Anderson, Jr.
JOSEPH F. ANDERSON, JR.
United States District Judge

May 10, 1996
Columbia, South Carolina

[Order Omitted in Printing]

[Filed May 10, 1996]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

C/A No. 0:92-1879-17

UNITED STATES OF AMERICA,
Plaintiff,

v.

HOECHST CELANESE CORPORATION,
Defendant.

JUDGMENT

Decision by the Court. This action came to hearing before the court. The Court having duly heard and granted in part the parties' cross motions for summary judgment.

IT IS ORDERED AND ADJUDGED that summary judgment is entered for the plaintiff, United States of America, as to the issue of the EPA's interpretation of 40 C.F.R. § 61.110(c)(2) and such interpretation is sustained by the court.

IT IS FURTHER ORDERED AND ADJUDGED that summary judgment is entered for the defendant Hoechst Celanese as to the issue of awarding no civil penalty to the plaintiff.

Each side shall bear its own costs.

Date May 10, 1996
Columbia, South Carolina

LARRY W. PROPES
Clerk

/s/ Gail D. Hayden
By: GAIL D. HAYDEN
Deputy Clerk

APPENDIX C

Filed December 23, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2003
CA-92-1879-0-17

UNITED STATES OF AMERICA,
Plaintiff-Appellant
v.

HOECHST CELANESE CORPORATION,
Defendant-Appellee

CHEMICAL MANUFACTURE'S ASSOCIATION; CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL; NATIONAL ASSOCIATION OF MANUFACTURERS; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; SCIENCE & ENVIRONMENTAL POLICY PROJECT; TEXAS INSTITUTE FOR ADVANCEMENT OF CHEMICAL TECHNOLOGY INCORPORATED; NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS; TEXAS NATURAL RESOURCE CONSERVATION COMMISSION (TNRCC),
Amici Curiae

No. 96-2051
CA-92-1879-0-17

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.

HOECHST CELANESE CORPORATION,
Defendant-Appellant

CHEMICAL MANUFACTURER'S ASSOCIATION; CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL; NATIONAL ASSOCIATION OF MANUFACTURERS; PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA; COMMONWEALTH OF VIRGINIA; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY; SCIENCE & ENVIRONMENTAL POLICY PROJECT; TEXAS INSTITUTE FOR ADVANCEMENT OF CHEMICAL TECHNOLOGY INCORPORATED; NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS; TEXAS NATURAL RESOURCE CONSERVATION COMMISSION (TNRCC),

Amici Curiae

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX D

FILED December 31, 1997

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2003
CA-92-1879-0-17

US

v.

HOECHST CELANESE

No. 96-2051
CA-92-1879-0-17

US

v.

HOECHST CELANESE

MANDATE

The judgment of this Court dated 10/27/97 takes effect today.

PATRICIA S. CONNOR
Clerk

APPENDIX E

Excerpt from Section 112 of the Clean Air Act (Pre-1990)

§§ 7412. National emission standards for hazardous air pollutants

(a) Definitions

For purposes of this section—

(1) The term "hazardous air pollutant" means an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) The term "new source" means a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source.

(3) The terms "stationary source", "modification", "owner or operator" and "existing source" shall have the same meaning as such terms have under section 7411(a) of this title.

(b) List of hazardous air pollutants; emission standards; pollution control techniques

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and shall from time to time thereafter revise) a list which includes each hazardous air pollutant for which he intends to establish an emission standard under this section.

(B) Within 180 days after the inclusion of any air pollutant in such list, the Administrator shall publish proposed regulations establishing emission standards for such pollutant together with a notice of a public hearing within thirty days. Not later than 180 days after such publica-

tion, the Administrator shall prescribe an emission standard for such pollutant, unless he finds, on the basis of information presented at such hearings, that such pollutant clearly is not a hazardous air pollutant. The Administrator shall establish any such standard at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant.

(C) Any emission standard established pursuant to this section shall become effective upon promulgation.

(2) The Administrator shall, from time to time, issue information on pollution control techniques for air pollutants subject to the provisions of this section.

(c) Prohibited acts; exemption

(1) After the effective date of any emission standard under this section—

(A) no person may construct any new source or modify any existing source which, in the Administrator's judgment, will emit an air pollutant to which such standard applies unless the Administrator finds that such source if properly operated will not cause emissions in violation of such standard, and

(B) no air pollutant to which such standard applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(i) such standard shall not apply until 90 days after its effective date, and

(ii) the Administrator may grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply with the standard, if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of

persons will be protected from imminent endangerment.

(2) The President may exempt any stationary source from compliance with paragraph (1) for a period of not more than two years if he finds that the technology to implement such standards is not available and the operation of such source is required for reasons of national security. An exemption under this paragraph may be extended for one or more additional periods, each period not to exceed two years. The President shall make a report to Congress with respect to each exemption (or extension thereof) made under this paragraph.

(d) State implementation and enforcement

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing emission standards for hazardous air pollutants for stationary sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard under this section.

(e) Design, equipment, work practice, and operational standards

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard for control of a hazardous air pollutant or pollutants, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which in his judgment is adequate to protect the public health from such pollutant or pollutants with an ample margin of safety. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper

operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce an emission standard" means any situation in which the Administrator determines that (A) a hazardous pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of an emission standard whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as an emission standard for purposes of the provisions of this chapter (other than the provisions of this subsection).

(July 14, 1955, ch. 360, title I, § 112, as added Dec. 31, 1970, Pub. L. 91-604. § 4(a), 84 Stat. 1685, and amended Aug. 7, 1977, Pub. L. 95-95, title I, §§ 109 (d)(2), 110, title IV, § 401(c), 91 Stat. 701, 703, 791; Nov. 9, 1978, Pub. L. 95-623, § 13(b), 92 Stat. 3458.)

Excerpt from Section 112 of the Clean Air Act (After 1990 Amendments)

(f) Standard to protect health and environment

(1) Report

Not later than 6 years after November 15, 1990, the Administrator shall investigate and report, after consultation with the Surgeon General and after opportunity for public comment, to Congress on—

(A) methods of calculating the risk to public health remaining, or likely to remain, from sources subject to regulation under this section after the application of standards under subsection (d) of this section;

(B) the public health significance of such estimated remaining risk and the technologically and commercially available methods and costs of reducing such risks;

(C) the actual health effects with respect to persons living in the vincinity of sources, any available epidemiological or other health studies, risks presented by background concentrations of hazardous air pollutants, any uncertainties in risk assessment methodology or other health assessment technique, and any negative health or environmental consequences to the community of efforts to reduce such risks; and

(D) recommendations as to legislation regarding such remaining risk.

(2) Emission standards

(A) If Congress does not act on any recommendation submitted under paragraph (1), the Administrator shall, within 8 years after promulgation of standards for each category or subcategory of sources pursuant to subsection (d) of this section, promulgate standards for such category or subcategory if

promulgation of such standards is required in order to provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990) or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. Emission standards promulgated under this subsection shall provide an ample margin of safety to protect public health in accordance with this section (as in effect before November 15, 1990), unless the Administrator determines that a more stringent standard is necessary to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect. If standards promulgated pursuant to subsection (d) of this section and applicable to a category or subcategory of sources emitting a pollutant (or pollutants) classified as a known, probable or possible human carcinogen do not reduce lifetime excess cancer risks to the individual most exposed to emissions from a source in the category or subcategory to less than one in one million, the Administrator shall promulgate standards under this subsection for such source category.

(B) Nothing in subparagraph (A) or in any other provision of this section shall be construed as affecting, or applying to the Administrator's interpretation of this section, as in effect before November 15, 1990, and set forth in the Federal Register of September 14, 1989 (54 Federal Register 38044).

(C) The Administrator shall determine whether or not to promulgate such standards and, if the Administrator decides to promulgate such standards, shall promulgate the standards 8 years after promulgation of the standards under subsection (d) of this section for each source category or subcategory concerned. In the case of categories or subcategories for which standards under subsection (d) of this section are required to be promulgated within 2 years after

November 15, 1990, the Administrator shall have 9 years after promulgation of the standards under subsection (d) of this section to make the determination under the preceding sentence and, if required, to promulgate the standards under this paragraph.

(3) Effective date

Any emission standard established pursuant to this subsection shall become effective upon promulgation.

(4) Prohibition

No air pollutant to which a standard under this subsection applies may be emitted from any stationary source in violation of such standard, except that in the case of an existing source—

(A) such standard shall not apply until 90 days after its effective date, and

(B) the Administrator may grant a waiver permitting such source a period of up to 2 years after the effective date of a standard to comply with the standard if the Administrator finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment.

(5) Area sources

The Administrator shall not be required to conduct any review under this subsection or promulgate emission limitations under this subsection for any category or subcategory of area sources that is listed pursuant to subsection (c)(3) of this section and for which an emission standard is promulgated pursuant to subsection (d)(5) of this section.

(6) Unique chemical substances

In establishing standards for the control of unique chemical substances of listed pollutants without CAS

numbers under this subsection, the Administrator shall establish such standards with respect to the health and environmental effects of the substances actually emitted by sources and direct transformation byproducts of such emissions in the categories and subcategories.

Excerpt from Section 301 of the Clean Air Act

Administration

(a) Regulations; delegation of powers and duties; regional officers and employees

(1) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations, *subject to section 7607(d)* as he may deem necessary or expedient.

* * * *

APPENDIX F

BENZENE LEAKS
NESHAP REGULATION AND PREAMBLE

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 61

[AD-FRL-2538-4]

National Emission Standards for Hazardous Air Pollutants; Benzene Equipment Leaks (Fugitive Emission Sources)

AGENCY: Environmental Protection Agency (EPA).
ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) listed benzene as a hazardous air pollutant under Section 112 of the Clean Air Act on June 8, 1977 (42 FR 29332). A standard was subsequently proposed for benzene fugitive emission sources (46 FR 1165, January 5, 1981). This *Federal Register* notice responds to comments on and promulgates the standards for benzene fugitive emission sources.

EFFECTIVE DATE: June 6, 1984. Under section 307(b)(1) of the Clean Air Act, judicial review of national emission standards for hazardous air pollutants (NESHAP) is available *only* by filing a petition for review in the United States Court of Appeals for the District of Columbia circuit within 60 days of today's publication of these rules. Under section 307(b)(2) of the Clean Air Act, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements. The director of the *Federal Register* approves the incorporation by reference of certain publications in 40 FR effective on June 6, 1984.

ADDRESSES: *Background Information Documents.* The background information documents (BID's) may be obtained from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number (919) 541-2777. For background information on today's promulgated standard, please refer to "Benzene Fugitive Emissions—Background Information for Promulgated Standards," EPA-450/3-80-032b. The BID for the promulgated standard contains: (1) A summary of all public comments on the proposed standard and the Administrator's response to the comments; (2) a summary of changes to the standard since proposal; and (3) the final environmental impact statement (EIS), which sumarizes the impacts of the standard.

Dockets. Docket No. A-79-27 contains technical information considered in developing the promulgated standard for benzene fugitive emissions. Docket No. OAQPS 79-3 (Part I) contains information considered on the health effects, listing, and regulation of benzene. These dockets are available for public inspection between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section (LE-131), West Tower Lobby, Gallery 1, 401 M Street, S.W., Washington, D.C. 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT:

For further information concerning the background technical information supporting the promulgated standard, contact Mr. James F. Durham, Chemicals and Petroleum Branch, Emission Standards and Engineering Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5671. For further information on the regulation of benzene and the promulgated standard, contact Mr. Gilbert H. Wood, Standards Development Branch, Emission Standards and Engineering Division (MD-13), U.S. Environmental Protection Agency, Re-

search Triangle Park, North Carolina 27711, telephone number (919) 541-5578.

SUPPLEMENTARY INFORMATION:

Background Information on Health Effects of Benzene

On June 8, 1977, the Administrator announced his decision to list benzene as a hazardous air pollutant under section 112 of the Clean Air Act (42 FR 29332). Supplementary background information regarding the health effects and listing of benzene as a hazardous air pollutant may be obtained from Docket No. OAQPS-79-3 (Part I). A public hearing was held on August 21, 1980, to discuss the health effects and listing of benzene as a hazardous air pollutant. Comments were received and EPA's responses are detailed in the EPA document, "Response to Public Comments on EPA's listing of Benzene Under section 112" (EPA—450/5-82-003).

Summary of the Standard

The standard applies to certain new and existing equipment in benzene service (i.e., equipment containing materials with a benzene concentration of 10 percent or more by weight) except those located in process units that produce benzene or benzene mixtures at coke by-product plants or at plant sites that are designed to produce or use benzene in quantities of 1,000 megagrams per year (Mg/yr) or less. Equipment covered by the standard includes new and existing valves, pumps, compressors, pressure relief devices, sampling connection systems, open-ended valves or lines, pipeline flanges, product accumulator vessels, and closed vent systems and control devices used to comply with the standard. The standard includes work practices and other requirements as provided by section 112(e) of the Clean Air Act and discussed in the preamble to the proposed rule (46 FR 1177). Permission to use any alternative means of emission limita-

tion will be granted after a notice is published in the Federal Register and an opportunity for a public hearing.

Valves. A monthly leak detection and repair program is required by the standard for valves in gas or liquid service. However, EPA will allow quarterly monitoring for valves that have been found not to leak for 2 successive months. This is monthly/quarterly leak detection and repair. Leak detection is to be performed with a portable organic vapor analyzer according to Reference Method 21 (see Appendix A of 40 CFR Part 60). If a reading of 10,000 ppm or greater of organic materials is obtained, a leak is detected. Initial repair of the leak must be attempted within 5 days, and the repair must be completed within 15 days.

Since proposal, provisions for difficult-to-monitor and unsafe-to-monitor valves have been added to the standard for valves. For existing valves, the standard has been changed to allow an annual leak detection and repair program for valves that are difficult to monitor. Valves that are difficult to monitor are defined as valves that would require elevating the monitoring personnel more than 2 meters above any permanent available support surface. This means valves that cannot be safely monitored by the use of step ladders could be classified as difficult to monitor.

In addition, some valves are unsafe to monitor. Valves that are unsafe to monitor cannot be eliminated in new or existing units. The final standard has been changed to allow an owner or operator to submit a plan that defines a leak detection and repair program conforming with the routine monitoring requirements of the standard as much as possible, with the understanding that monitoring should not occur during unsafe conditions. Valves that are unsafe to monitor are defined as those valves that could, as demonstrated by the owner or operator, expose monitoring personnel to imminent hazards from temperature, pressure,

or explosive process conditions. EPA expects very few unsafe-to-monitor valves in benzene service.

At proposal, two alternative standards were presented for valves in gas/vapor and liquid service. Both of these alternatives called for 1 year of monthly monitoring to obtain data on which to base the alternative standard. However, since proposal, the two alternative standards have been changed in response to comments concerning the need to collect data.

The first alternative standard specifies a 2 percent limitation as the maximum percent of valves leaking within a process unit, determined by a minimum of one performance test annually. This alterative provides the flexibility of a performance level that could be met by implementing any type of leak detection and repair program and engineering controls chosen at the discretion of the owner or operator. If the results of a performance test show a percentage of valves leaking higher than 2 percent, however, the process unit would not be in compliance with the standard. Finally, if owners or operators determine that they no longer wish to comply with this alternative standard, they must submit a notification in writing to EPA stating that they will comply with the monthly/quarterly leak detection and repair program.

The second alternative standard specifies two statistically-based skip-period leak detection and repair programs. Under skip-period leak detection, an owner or operator can skip from routine monitoring [monthly/quarterly monitoring] to less frequent monitoring after completing a number of consecutive monitoring intervals with performance levels less than 2 percent. This approach provides that the performance level is achieved for each skipped period with better than 90 percent certainty. Based on this skip-period approach, two sets of consecutive periods and fraction of periods skipped were determined for benzene process units. First, after two consecutive quarterly periods with fewer than 2 percent of

valves leaking, an owner or operator may skip to semi-annual monitoring. Second, after five consecutive quarterly periods with fewer than 2 percent of valves leaking, an owner or operator may skip to annual monitoring. This alternative standard also requires that, if a process unit exceeds the 2 percent of valves leaking, the owner or operator must revert to the monthly/quarterly leak detection and repair program. Compliance with this alternative standard would be determined by inspection and review of records.

The delay of repair provisions for valves have been expanded in the final standard. In the proposed standard, delay of repair was allowed where repair is technically or physically infeasible without a process unit shutdown. In addition to the provision already in the proposed standard, several provisions have been added to the final standard. One added provision allows for delay of repair beyond a process unit shutdown for valves when unforeseeable circumstances deplete valves used for repair. Another provision has been added to allow delay of repair for valves if the owner or operator shows that leakage of purged material during repair is greater than the equipment leaks that are likely to result from delay of repair. EPA expects this provision to be used seldom.

A definition of "process unit shutdown" has been added to the standard to avoid extended delays in returning a process unit to production if the unit shuts down briefly due to unforeseen circumstances. Delay of repair beyond an unforeseen process unit shutdown is less than 24 hours in duration. Repair of leaking equipment for which repair has been delayed would be required at the next process unit shutdown.

As part of the delay of repair requirements, EPA is clarifying its intent for spare equipment that does not remain in benzene service. Delay of repair of equipment for which leaks have been detected will be allowed if the equipment is isolated from the process and no longer con-

tains benzene in concentrations greater than 10 percent. The equipment purge must be destroyed or recovered in a system that complies with the requirements discussed in the *Closed-vent systems and control devices* portion of this section of the preamble.

Pumps. A monthly leak detection and repair program is required by the standard for benzene-handling pumps in liquid service. Leak detection is to be performed with a portable organic vapor analyzer according to Reference Method 21. If a reading of 10,000 ppm or greater of organic materials is obtained, a leak is detected. Initial repair of the leak must be attempted within 5 days, and the repair must be completed within 15 days. Delay of repair will be allowed for pumps that cannot be repaired without a process unit shutdown. Delay of repair, up to 6 months after detecting a leak, is also allowed when the plant owner or operator determines that repair of the pump requires using a dual mechanical seal system. Delay of repair is not expected to be needed for most situations, however, because pumps are commonly spared.

At proposal, EPA required a monthly leak detection and repair program for existing pumps but required the installation of dual mechanical seal systems for new pumps. Since proposal, as discussed in the *Selection of the Final Standard* section of this preamble, EPA analyzed the annualized cost of controlling benzene emissions and the resultant emission reduction for each alternative control technique. Based on comparison of costs and emission reductions, including estimates of exposures to benzene, EPA selected the work practice standard (leak detection and repair) for new as well as existing pumps. However, EPA is allowing the use of dual mechanical seal systems in the final standard. If an owner or operator prefers, he or she may comply with the equipment standard. The details or provisions of the equipment standard have not been changed since proposal.

Compressors. The standard for new and existing compressors requires the use of mechanical seals with barrier

fluid systems and controlling degassing vents. The controlling degassing vents must use a closed-vent system and a control device that complies with the requirements as discussed in the *Closed-vent systems and control devices* portion of this section of the preamble. For existing compressors, EPA proposed a monthly leak detection and repair program. Since proposal, EPA reconsidered the selection of the final standard and concluded that the installation of control equipment is the only viable control technique for compressors.

Pressure relief devices. The use of control equipment (rupture disk systems or closed-vent systems to flares) is the basis for the standard for pressure relief devices in gas service. For control techniques that eliminate equipment leaks, such as the use of rupture risk systems, an emission limit measurement for "no detectable emissions" can be established. An instrument reading of less than 500 parts per million by volume (ppmv) above a background concentration based on Reference Method 21 will be used to indicate whether equipment leaks have been eliminated.

The "no detectable emission" limit will not apply to discharges through the pressure relief device during overpressure relief because the function of relief devices in to discharge process fluid, thereby reducing dangerous high pressures within the equipment. The standard specifies, however, that the relief device be returned to a "no detectable emissions" status within 5 days after such a discharge. The standard further requires an initial and annual test to verify the "no detectable emissions" status of the pressure relief devices.

Plant owners or operators may also comply with this standard by connecting pressure relief devices in gas service to a system that complies with the requirements as discussed in the *Closed-vent systems and control devices* portion of this section of the preamble. Since proposal, the use of flares has been allowed as an alternative control device in the final standard. EPA judges that the added

emission reduction achieved by reducing the emissions that occur during overpressure relief offsets the decrease in emission reduction that would occur by allowing 95 percent reduction (level of control required of all control devices) rather than the 100 percent reduction associated with rupture risk systems.

Sampling connection systems. Closed-purge sampling is the required standard for sampling connection systems. Closed-purge sampling connection systems eliminate emissions due to purging by either returning the purge material directly to the process or by collecting the purge in a collection system that is not open to the atmosphere. Collected purge material must be destroyed or recovered in a system that complies with requirements discussed in the *Closed-vent systems and control devices* portion of this section of the preamble.

Since proposal, EPA decided to allow closed-vent vacuum systems connected to a control device and *in-situ* sampling systems in addition to closed-purge sampling. Closed-vent vacuum systems that are connected to a control device extract the sample purge and then reduce emissions from the sample purge by transporting benzene to the control device. If closed-vent vacuum systems are not open to the atmosphere and the system complies with the requirements discussed in the *Closed-vent systems and control devices* portion of this section of the preamble, then their reduction of benzene emissions would be equivalent to the reduction achieved by closed-purge sampling connection systems. *In-situ* sampling systems involve measurement or sampling of process stream conditions without extraction of the sample from the process stream. *In-situ* sampling systems, therefore, result in no emissions of benzene.

Open-ended valves or lines. The standard for open-ended valves or lines requires the use of caps, plugs, or any other equipment that will effect enclosure of the open end. The standard has not changed since proposal. If a second valve is used, the standard requires the upstream

valve to be closed first. After the upstream valve is completely closed, the downstream valve must be closed. This operational requirement is necessary in order to prevent trapping process fluid between the two valves, which could result in a situation equivalent to the uncontrolled open-ended valve or line.

Product accumulator vessels, pipeline flanges, and pressure relief devices in liquid service. The standard for product accumulator vessels effectively requires venting accumulator vessel emissions to a system that complies with the requirements as discussed in the *Closed-vent systems and control devices* portion of this section of the preamble. Flanges and pressure relief devices in liquid service will be excluded from the routine leak detection and repair requirements. However, if leaks are detected from these sources, the same allowable repair interval that applies to valves and pumps will apply.

Closed-vent systems and control devices. Control devices will be used to reduce benzene equipment leaks captured and transported through closed-vent systems. Reference Method 21 will be used to verify that a closed-vent system has been designed and installed properly. At proposal, control devices were required to be either enclosed combustion devices designed to provide a minimum residence line of 0.50 seconds at a minimum temperature of 760°C or vapor recovery systems with an efficiency of 95 percent or greater. Based on review of comments on the proposed standard, EPA concluded that all reasonably designed, existing control devices for organic emissions can achieve a reduction efficiency for benzene of at least 95 percent. EPA, therefore, has not changed the requirements for control devices. EPA has made it clear, however, that an enclosed combustion device with a reduction efficiency of at least 95 percent can be used even if the residence time and minimum temperature requirements are not achieved.

Additionally, EPA decided to allow use of smokeless flares operated under certain conditions in complying with

the control device requirements because EPA believes that destruction efficiencies better than 95 percent can be obtained with properly operated flares. Flares operated within these conditions are considered as alternatives to enclosed combustion devices (incinerators, catalytic incinerators, boilers, process heaters, etc.) and vapor recovery systems (such as carbon adsorbers and condensation units). They may be applied to control emissions from pump seals (or degassing reservoirs), compressor seals (or degassing reservoirs), pressure relief devices, and product accumulator vessels. The conditions include a requirement for the presence of a flame; this can be ensured by monitoring the flare's pilot light with an appropriate heat sensor, such as a thermocouple. The conditions also include requirements for smokeless operation (visible emissions are limited to less than 5 minutes in any 2-hour period) and for the heat content of gases combusted by the flare. The standards for closed vent systems and control devices permit the use of devices that have an efficiency better than 95 percent, including steam-assisted and nonassisted flares designed for and operated with an exit velocity of less than 18 m/sec. EPA has been studying the question of whether additional types of flares will also achieve better than 95 percent efficiency; if so, the Agency will revise the standards accordingly.

Reporting and recordkeeping. The promulgated standard includes reporting provisions requiring semiannual reports of leak detection and repair efforts within a process unit. The amount of reporting and the burden associated with the reporting have been reduced from those in the proposed standard. In particular, the quarterly reporting requirement in the proposed standard has been reduced to semiannual reporting. The burden associated with the recordkeeping requirements has also been reduced since proposal. However, the final standard additionally requires that records be kept of periods when a flare pilot light does not have a flame and that unsafe-to-monitor and difficult-to-monitor valves be identified.

Summary of Impacts of the Standard

The standard applies to certain equipment in benzene service. This equipment is used in the production of benzene and other chemicals and products, such as maleic anhydride, ethanol, and pharmaceuticals. The standard will affect equipment located in more than 200 existing process units and an expected 60 new process units by the final standard.
1985.

The environmental, health, economic, and energy impacts are summarized here and are discussed in greater detail in the BID for the promulgated standard, "Benzene Fugitive Emissions—Background Information for Promulgated Standard," EPA-450/3-80-032b.

Environmental and health impacts. Since the standard was proposed, EPA has revised the baseline emission estimate and the estimate of benzene leaks to the atmosphere that will be reduced by the standard. The final standard will reduce emissions from existing benzene equipment leaks by about 69 percent from the baseline control level, which includes petroleum refinery CTG controls. This percentage reduction represents a decrease in emissions from about 7,920 megagrams of benzene per year (Mg/yr) to about 2,470 Mg/yr for existing equipment leaks of benzene. Implementation of the standard will result in negligible impacts on water quality and solid waste. No noise impact will result.

EPA has also revised the assessment of leukemia risk from exposure to existing equipment leaks of benzene as a result of revised emission estimates, exposure modeling techniques, and the benzene unit risk factor. In its revised estimate, EPA has calculated that the standard will reduce the estimated maximum lifetime risk for the most exposed population from about 1.5×10^{-3} at current (baseline) controls to about 4.5×10^{-4} for existing benzene equipment leaks. The standard will reduce the estimated annual incidence of leukemia (cases per year) for the public

living within 20 kilometers of existing benzene equipment leaks from about 0.45 cases per year at current controls to about 0.14 cases per year. Due to the assumptions that were made in calculating these maximum lifetime risk and leukemia incidence members, there is uncertainty associated with the numbers presented here and elsewhere in this preamble. The use of the risk numbers is discussed in the *Federal Register* notice regarding the regulation of benzene as a hazardous air pollutant.

Cost and economic impacts. Since the standard was proposed, EPA has reanalyzed the cost of controlling benzene equipment leaks and the resultant benzene emission reduction for each type of equipment covered by the standard and for each control technique. In response to comments, EPA considered the costs and emission reductions associated with each type of equipment in selecting the final standard.

For existing equipment the nationwide capital cost for the standard will be about $5.5 million, and the 1985 nationwide annualized cost as a result of the standard will be about $400,000. Because the cost of the standard is mostly offset by the value of the benzene recovered by the standard and, to the extent that the cost is not completely offset, the cost is very small in comparison to the value of the product made by this equipment, product prices will not increase as a result of the standard. Thus, profits and market positions of individual manufacturers would be unchanged.

Energy impacts. The final standard will result in a positive energy impact by conserving benzene and other organic compounds that have an energy value. Implementation of the standard will result in an energy savings of about 10,000 barrels of crude oil in the fifth year of the standard.

New sources. The standard will result in positive environmental and health impacts for new equipment leaks of benzene. The magnitude of these impacts is difficult to determine because it will depend on several factors,

including the location of the new equipment, the number and distribution of people living in the vicinity of the new equipment, and the level of control that would have been used in the absence of the standard. The nationwide capital and 1985 annualized costs for new equipment will depend on the level of control that would have been used in the absence of this standard. These factors cannot be determined definitely before sources are actually constructed. Because EPA recognizes this additional uncertainty in environmental and health impacts, cost and economic impacts, and energy impacts for leaks of benzene from new equipment, these impacts are not presented here. The impacts, however, will be proportionately similar to the impacts for existing sources; that is, if the standard results in less emission reduction for new sources than for existing sources (because fewer new sources would be covered), then the cost of this emission reduction will be proportionately less also.

Public Participation

Prior to proposal of the standard, interested parties were advised by public notice in the *Federal Register* (45 FR 18474, March 21, 1980) of a meeting of the National Air Pollution Control Techniques Advisory Committee to discuss the national emission standard for benzene fugitive emissions recommended for proposal. This meeting was held on April 16, 1980. The meeting was open to the public, and each attendee was given an opportunity to comment on the standard recommended for proposal. The standard was proposed in the *Federal Register* on January 5, 1981 (46 FR 1165). The preamble to the proposed standard discussed the availability of the BID for the proposed standard (EPA-450/3-80-032a), which described in detail the regulatory alternatives considered and the impacts of those alternatives. Public comments were solicited at the time of proposal, and when requested, copies of the BID were distributed to interested parties. To provide interested persons the opportunity for oral presentation of data, views, or argu-

ments concerning the proposed standard, a public hearing was held on July 14, 1981, at Research Triangle Park, North Carolina. The hearing was open to the public, and each attendee was given an opportunity to comment on the proposed standard. The public comment period was extended to September 14, 1981.

EPA received 30 comment letters on the proposed standard and BID. Industry representatives submitted most of the comments. Also commenting were representatives of State and local air pollution agencies and a representative of an environmental group. The comments have been considered carefully and, where determined to be appropriate by EPA, changes have been made to the proposed standard.

EPA published an Additional Information Document (AID) in April of 1982. The AID contains a technical discussion of methodologies and estimates of emissions, emission reductions, and cost associated with control of equipment leaks of organic compounds, including benzene. A notice of the availability of the AID and a request for comments on the AID was published in the *Federal Register* on May 7, 1982 (47 FR 19724). Fourteen letters were received containing comments on the AID. Comments on the AID have been considered carefully, and changes have been made to the technical aspects of EPA's analysis where appropriate.

Significant Comments and Changes to the Proposed Standard

Most of the comment letters contained multiple comments, and many of the comment letters repeated comments contained in other letters. A detailed discussion of these comments and responses can be found in the BID for the promulgated standard, which is referred to in the ADDRESSES section of this preamble. The comments and responses in the BID for the promulgated standard serve as the basis for the revisions that have been made to the standard between proposal and promulgation. The

major revisions to the standard are indicated in the SUMMARY OF THE STANDARD section of this preamble.

The most important comments, in addition to the comments on the listing of benzene, considered by EPA concerned whether benzene fugitive emissions warrant regulation. Benzene fugitive emissions, which are not substantially different from the emissions judged to be significant at proposal, contribute 7,900 Mg/yr; this figure reflects current controls. (EPA adjusted the control level for petroleum refineries in nonattainment areas to reflect controls required by States in accordance with EPA's Control Techniques Guideline (CTG) document. This adjustment reduced emissions, but the reduction was offset to some extent by refinements in emission factors.) Approximately 20 to 30 million people live within 20 kilometers of the 128 plants with these fugitive emissions. These people are exposed to higher levels of benzene than is the general population. Due to the lack of a demonstrated threshold for benzene's carcinogenic effects, these people not only incur a higher benzene exposure but also run greater risk of contracting leukemia due to that exposure.

EPA revised the quantitative risk assessments for this source category based on the updated emissions estimates, the revised risk factor, and the more detailed SAI human exposure model. The lifetime risk of contracting leukemia for the most exposed individuals is estimated to be about 1.5×10^{-3} for benzene fugitive emission sources, and the increased leukemia incidence as a result of exposure to the current fugitive emissions is estimated to be about 0.45 cases per year.

The number of process units emitting benzene fugitive emissions is anticipated to grow from about 240 to 310 units. These new sources would probably increase the number of people exposed to benzene emitted from this source category and increase the estimated leukemia incidence accordingly.

Based on the human carcinogenicity of benzene, the magnitude of benzene fugitive emissions, the estimated ambient benzene concentrations in the vicinity of the plants with fugitive emissions, the proximity of people to these plants, the resulting estimated maximum individual risks and estimated incidence of leukemia cases in the exposed population, the projected increase in benzene emissions as a result of new sources, the estimated reductions in emissions and health risks that can be achieved, and consideration of the uncertainties associated with the quantitative risk estimates (including effects of concurrent exposures to other substances and to other benzene emissions), EPA finds that benzene emissions from benzene fugitive emission sources pose a significant cancer risk and that the establishment of a national emission standard under Section 112 is warranted.

In this preamble, only the major comments concerning the standard for equipment leaks of benzene are addressed. Comments on the need for standards to cover emission sources of benzene (including equipment leaks of benzene) and health effects and risk assessment of exposure to benzene are addressed in detail in the *Federal Register* notice regarding the regulation of benzene as a hazardous air pollutant. Comments on minor issues, such as test methods and procedures, are addressed in detail in the BID for the promulgated standard. This preamble addresses issues concerning selection of the final standard, economic impact of the final standard, and recordkeeping and reporting requirements.

Selection of the Final Standard

EPA selected the appropriate levels of control for the benzene fugitive emissions standard in light of carcinogenic risks and technological and economic factors. EPA is requiring that the source categories selected for regulation, as a minimum, achieve emission levels reflecting best available technology considering costs, energy, and economic impacts (BAT), to control benzene emissions. After selecting BAT, EPA identified a level of control

more stringent than BAT and evaluated the incremental reductions in health risks obtainable against the incremental costs and economic impacts estimated to result from the application of a more stringent alternative. As described in more detail later in this notice, EPA concluded from this evaluation that the estimated risks remaining after the application of BAT to benzene fugitive emission sources are not unreasonable in view of the costs and economic impacts of reducing risks further, and that for this reason, BAT provides an ample margin of safety to protect human health.

Many people commented on the basis for section of the proposed standard. Several commenters questioned the cost effectiveness (cost per unit of emission reduction) and impacts of Regulatory Alternatives III and IV for existing and new equipment in benzene service. Some of the commenters recommended the selection of less stringent regulatory alternatives, and some recommended the selection of a more stringent regulatory alternative. Other commenters stated that selection should be based on the cost and emission reduction impacts for each type of equipment covered by the standard instead of regulatory alternatives.

After considering these comments, EPA selected the final standards for new and existing equipment in benzene service. Selection of the basis of the final standard was a two-step process and was similar to the approach used when the standard was proposed. The first step was the selection of the best available technology (BAT). Best available technology for equipment in benzene service is technology which, in the judgment of the Administrator, is the most effective level of control considering economic, energy, and environmental impacts and any technological problems associated with the retrofitting of existing equipment. After consideration of these impacts for each alternative control technique, one set of control techniques was selected as BAT for equipment in benzene service.

After selecting certain control techniques as BAT, EPA evaluated the estimated health risks remaining after application of BAT to determine if they are unreasonable in view of health risk reductions and cost (economic) impacts that would result if a more stringent level of control were applied. This provides a comparison of the costs and economic impacts of control with the benefits of further risk reduction. The benefits of risk reduction are expressed in terms of the estimated leukemia incidence (cases per year) within 20 kilometers of the equipment covered by the standard and the estimated maximum lifetime risk at the point of maximum exposure. The results of this comparison determine whether, in the judgment of the Administrator, the residual risks remaining after application of BAT are unreasonable. If the risks remaining after application of BAT are judged to be unreasonable, further controls would be required.

The cost of the proposed control techniques for benzene equipment leaks are very small relative to the capital and operating costs of affected process units. As a consequence, none of these control techniques impact the ability of an owner or operator to raise capital or measurably impact product prices or energy requirements. Therefore, EPA selected BAT primarily based on a comparison of costs and emission reduction associated with each alternative control technique. In making this decision, EPA is accepting the suggestions of commenters to consider further cost per unit emission reduction estimates and to consider these estimates for each type of equipment covered by the standard in the selection of BAT. In selecting BAT, EPA initially selected control techniques that achieve the greatest emission reduction with reasonable control costs per megagram of emission reduction. The emission reductions and the average and incremental costs per megagram of benzene and total emissions (including benzene and other volatile organic compounds (VOC)) are summarized in Tables 1 and 2, respectively, for each type of equipment covered by the standard. After initially

selecting one set of control techniques as BAT for each type of equipment covered by the standard, EPA analyzed economic and other impacts of this set of control techniques. To the extent that these impacts were reasonable, the control techniques were selected as BAT and then were used in estimating the risks remaining after application of BAT.

[Table 1. Control Costs per Megagram of Benzene Reduced and Table 2. Control Costs per Megagram of Total Emissions Reduced Omitted in Printing.]

For each type of equipment, the average cost effectiveness of each control technique was calculated based in the net annualized cost and the annual emission reduction from the uncontrolled level. Starting with the most stringent control technique, which achieves the greatest emission reduction of the greatest annualized cost. EPA examined the incremental cost effectiveness between the most stringent control technique and the next less restrictive control technique. The incremental cost effectiveness between any two alternative control techniques was based on the difference in net annualized costs divided by the difference in the annual emission reductions of the alternate control techniques. If the incremental cost in comparison to the incremental emission reduction is judged unreasonable, then the next increment is examined until a control technique with a reasonable incremental cost in comparison to the incremental emission reduction is available.

Costs per megagram of emission reduction (average and incremental) were calculated in terms of total emissions (benzene and other VOC) as well as benzene alone. Control of benzene equipment leaks results in the destruction of other organic compounds (mainly VOC) as well as benzene; therefore, control of VOC is an added benefit of controlling benzene. In making decisions about the acceptability of the cost of emission reductions achieved by a control technique, it is appropriate to consider the VOC as well as the benzene emission reductions. However, VOC emission reductions were considered only in

the sense that VOC emission reductions can add weight to selecting a control technique as BAT.

The basis for selecting BAT for each type of equipment in benzene service is discussed below. It should be noted that the control costs for each type of equipment do not represent the actual amounts of money spent at any particular plant site. The cost of emission reduction systems will vary according to the chemical product being produced, production equipment, plant layout, geographic location, and company preferences and policies. However, these costs and emission reductions are considered typical of control techniques for benzene equipment leaks and can be used in selecting the level of control to be required by the standard.

Valves. EPA first considered the use of sealed bellows valves. However, a requirement for sealed bellows valves is considered unreasonable. The incremental cost for the use of sealed bellows valves compared to a monthly leak detection and repair program for valves is about $49 million/yr for existing valves and results in an emission reduction of about 1,100 Mg/yr of benzene; this represents Furthermore, the use of sealed bellows valves results in an incremental cost effectiveness of about $44,000/Mg. an incremental emission reduction of 1,870 Mg/yr of total emissions (including benzene and other VOC). Because the incremental cost effectiveness ($44,000/Mg of benzene) of this control technique is relatively high and because the additional emission reduction of VOC does not add enough weight to convince EPA that the costs are reasonable, EPA decided not to require the use of sealed bellows valves.

Next, EPA considered several leak detection and repair programs for valves. The leak detection and repair programs differed in the monitoring frequency that could be implemented. As Tables 1 and 2 show, all of the monitoring programs would result in net credits because the value of recovered product resulting from implementa-

tion of each program is greater than the cost of each program. The largest emisssion reduction is associated with the monthly program. The incremental cost for a monthly program compared to a quarterly program is about $48,000/yr for existing valves and results in an incremental benzene emission reduction of about 400 Mg./yr; this represents an incremental cost effectiveness of about $120/Mg of benzene. Because EPA considers the incremental cost effectiveness associated with the monthly program to be reasonable, EPA selected a monthly leak detection and repair program as BAT for valves.

Pumps. The costs and emission reductions associated with the control of pumps were determined for three leak detection and repair programs and the use of dual mechanical seal systems. The incremental cost associated with the use of dual mechanical seal systems (compared to the monthly program) on existing pumps is about $3.3 million/yr and results in an incremental emission reduction of about 220 Mg/yr of benzene; this represents an incremental cost effectiveness of $15,000/Mg. Furthermore, the use of dual mechanical seal systems reduces an incremental 380 Mg/yr of total emissions (including benzene and other VOC). Because the incremental cost effectiveness ($15,000/Mg of benzene) is relatively high and because the additional emission reduction of VOC does not add enough weight to convince EPA that the costs are reasonable, EPA decided not to require the use of dual mechanical seal systems.

Next, EPA considered leak detection and repair programs for pumps. Monthly and quarterly leak detection and repair programs both result in net annual savings. The annual program results in a cost of about $250,000/yr for a benzene emission reduction of about 290 Mg/yr; this represents a cost effectiveness of about $870/Mg of Benzene. EPA decided not to select an annual program as BAT because it results in higher costs and lower emission reductions in comparison to either a

monthly program or a quarterly program. The monthly program achieves a higher degree of control than the quarterly program at a slightly lower credit. The monthly program (compared to the quarterly program) results in a savings and an incremental emission reduction of about 180 Mg/yr of benzene; this represents an incremental cost effectiveness of essentially zero for existing pumps in benzene service. Because EPA considers the incremental cost effectiveness associated with monthly monitoring of pumps reasonable, monthly leak detection and repair was selected as BAT for pumps.

Compressors. One control technique is considered viable for compressors in benzene service—the installation of equipment such as control of the barrier fluid system. The installation of control equipment results in an emission reduction of about 3.5 Mg/yr per compressor at a savings in cost for each compressor. The control technique results in a savings because the value of product retained by controlling the barrier fluid system exceeds the cost of the control equipment. Since this cost is reasonable, control equipment was selected as BAT for compresssors.

For existing compressors, EPA proposed a monthly leak detection and repair program. At proposal, EPA selected, as the basis of the standard for existing pumps and compressors, a monthly leak detection and repair program because some existing pumps could not be reasonably retrofitted with dual mechanical seal systems and because the cost of retrofitting compressors and replacing pumps was considered exorbitant in light of the resulting emissions reductions. Since proposal, EPA has concluded that the effectiveness of a leak detection and repair program for compressors in benzene service would be negligible. Also, as requested by commenters, EPA has analyzed compressors separately from pumps. This analysis yields the cost and emission reduction estimates above. EPA has thus concluded that control equipment is reason-

able for existing compressors and, therefore, selected it as BAT for existing compressors as well as new compressors.

Pressure relief devices. The annualized costs and emission reductions associated with monthly and quarterly leak detection and repair programs and with the use of control equipment (rupture disks and flares) were determined for pressure relief devices in gas service. As Tables 1 and 2 show, both the quarterly and monthly leak detection and repair programs are less expensive than installation of equipment controls, but they result in lower emission reductions. These programs result in an incremental cost effectiveness of about $300/Mg of benzene for the monthly program (compared to the quarterly program) and a credit for the quarterly program. Equipment controls would result (compared to a monthly program) in incremental emission reductions of about 90 Mg/yr of benzene and an incremental cost of about 150,000/yr. This reflects an incremental cost effectiveness of about $1,700/Mg. Because EPA considers the incremental cost effectiveness of equipment controls reasonable, equipment controls were selected as BAT for pressure relief devices.

Open-ended lines, sampling connection systems, and product accumulator vessels. EPA considered caps or closures as the control technique for the standard for open-ended lines. Costs of $430/Mg and $470/Mg of benzene are reasonable for controlling equipment leaks of benzene from new and existing open-ended lines, respectively. EPA selected caps or closures as BAT for open-ended lines.

EPA considered closed-purge sampling as the control technique for the standard for sampling systems. Costs of $430/Mg and $900/Mg of benzene are reasonable for controlling equipment leaks of benzene from new and existing sampling systems, respectively. EPA selected closed-purge sampling as BAT for sampling systems.

EPA considered closed-vent systems connected to a control device as the control technique for the final stand-

ard for product accumulator vessels. For existing units in benzene service, the installation of closed-vent systems connected to a control device will result in a nationwide net annual cost of $10,300 and an annual emission reduction of about 100 Mg of benzene; this represents a cost effectiveness of about $100/Mg. Since the cost associated with this control technique is reasonable, EPA selected closed-vent systems as BAT for product accumulator vessels.

New sources. Emission reductions and costs for new sources are similar to those for existing sources. If the standard results in less emisssion reduction for new sources (because fewer new sources would be covered), then the cost of the emission reduction for new sources will be less. However, as seen in Tables 1 and 2, the costs that are unreasonable for existing sources are also unreasonable for new sources; therefore, BAT for new sources is the same as BAT for existing sources.

Economic impact considerations of BAT. As mentioned above, once BAT was identified for each type of equipment covered by the standard, EPA analyzed the economic impact of the initial set of BAT control techniques. As a result and as explained in the next section of this preamble, EPA concluded that the control techniques initially selected as BAT have reasonable economic impacts. In addition, EPA has also concluded that other impacts, environmental and energy, associated with these control techniques are reasonable. Thus, they were selected as BAT for equipment in benzene service.

Selection of the final standards. After selecting certain control techniques as BAT (those identified above), EPA evaluated the estimated health risks remaining after application of BAT to determine if they are unreasonable in view of health risk reductions and cost (economic) impacts that would result if a more stringent level of control were applied. Because the most stringent, viable control technique for each type of equipment covered by the

standard is already selected for all types of equipment except for valves and pumps, EPA identified a more stringent level of control by reviewing the control techniques for valves and pumps. The more stringent level of control used for this analysis includes the use of dual mechanical seal systems on pumps in addition to the requirements selected as BAT. This control technique was selected for analysis because it adds the next most cost-beneficial control technique. Thus, if EPA decided not to require this control technique in addition to those control techniques selected as BAT, then EPA would not require less cost-beneficial control techniques, such as sealed bellows valves.

Health and cost impacts were first examined for existing equipment covered by the standard to determine whether a more stringent level of control should be required. Requiring a more stringent level of control instead of BAT would reduce estimated leukemia incidence within 20 kilometers of the equipment covered by the standard from about 0.14 cases per year to about 0.13 cases per year for existing equipment. It would reduce the estimated maximum lifetime risk at the point of maximum exposure from about 4.5×10^{-4} to about 4.2×10^{-4}. Requiring the more stringent level of control rather than BAT would increase capital cost from $5.5 million to $19.5 million and would increase 1985 net annualized costs from $400,000 to a cost of $3.7 million for existing equipment. Because of the relatively small health benefits to be gained with the additional costs of requiring the more stringent level of control instead of BAT for existing equipment, EPA considers the risks remaining after application of BAT to existing equipment not to be unreasonable. For this reason, EPA judged the level of control selected as BAT to provide an ample margin of safety and decided not to require a more stringent level of control than BAT for existing equipment.

Health and cost impacts were next examined for new equipment covered by the standard to determine whether

a more stringent control level should be required. As with existing equipment, EPA considered the use of dual mechanical seal systems on pumps as the more stringent control level that is next most cost-beneficial. Thus, if EPA decides not to require the use of these seals, then EPA would not require less cost beneficial control technologies, such as sealed bellows valves. Requiring the more stringent level of control—the use of dual mechanical seals on pumps in addition to BAT—could reduce estimated leukemia incidence within 20 kilometers of the equipment covered by the standard from about 0.034 cases per year to about 0.032 cases per year for new equipment. It would reduce the estimated maximum lifetime risk at the point of maximum exposure from about 4.5×10^{-4} to about 4.2×10^{-4}. Requiring the more stringent level of control rather than BAT would increase capital cost from $1.4 million to $5.1 million and net annualized costs of $100,000 to $900,000 for new equipment. Because of the relatively small health benefits to be gained with the additional costs of requiring the more stringent level of control instead of BAT for new equipment, EPA considers the risks remaining after application of BAT to new equipment not to be unreasonable. For this reason, EPA judged the level of control selected as BAT to provide an ample margin of safety and decided not to require a more stringent level of control than BAT for new equipment.

Economic Impacts of the Final Standard

The cost of the proposed standard is discussed in Chapter 8 of the BID for the proposed standard, and economic impacts are discussed in Chapter 9. Changes made to the standard since proposal make the annualized cost of the final standard smaller than the annualized cost for the proposed standard. The 1985 net annualized cost of the final standard is $400,000 for existing units and $100,000 for new units. The BID for the proposed standard concludes that any potential price increases resulting from

imposition of the proposed standard would be well under 1 percent and that the profits and market positions of individual manufacturers would not be changed. In view of the lower cost of the final standard, these conclusions can be underscored.

Comments and responses in this section are addressed in three categories: impacts on small facilities, cost effectiveness, and benefit-cost considerations. This categorization is not rigid because some comments are quite broad.

Impacts on small plants. This subsection addresses two principal concerns: the effect of the standard on small businesses, and the application of the standard to small process units and to process units that use minor amounts of benzene or that use benzene intermittently.

The Regulatory Flexibility Act (Pub. L. 96-354, September 19, 1980) directs Federal agencies to pay close attention to minimizing any potentially adverse impacts of a standard on small businesses, small governments, and small organizations. Accordingly, EPA has reviewed the final standard in accordance with the Regulatory Flexibility Act. This standard will have no known effects on small governments and small organizations. A small business in the benzene-using industries generally is one that employs fewer than 750 persons. This level was set by the Small Business Administration (SBA) as a criterion for extending SBA loans and related assistance (13 CFR Part 121. Schedule A). The definition applies to firms that manufacture cyclic crudes and cyclic intermediates, pharmaceuticals, and many other chemicals. The BID for the proposed standard lists 77 existing companies that may be affected by the standard. Most of these companies manufacture cyclic crudes and many other chemicals. With the possible exception of two companies, all of these firms either employ more than 750 persons, or are subsidiaries of large firms. To the extent these two companies are small businesses, the impacts of the standard will be few and minor. Because the standard is expected to result

in small annualized costs, EPA concluded that there will be no adverse impacts on firms regardless of whether they are a small business or not.

One commenter felt that the leak detection and repair requirements would impose substantial costs on small-volume users of benzene with no appreciable benefit to public health. According to the commenter, small-volume pipeline systems at pharmaceutical plants may contain several hundred valves that would need to be monitored monthly when in benzene service. The commenter added that the economic and administrative burden of complying with the standard would be heavy for small-volume users, as compared to large benzene production units, in proportion to the level of equipment leaks from such facilities.

As discussed in section 2.8.1 of the BID for the promulgated standard, EPA is exempting from the standard equipment at plant sites that are designed to produce or use 1,000 Mg/yr or less of benzene. This cutoff is based on the amount of equipment in a process unit and relates this amount to a design production rate. The 1,000 Mg/yr exemption would exclude most research facilities, pilot plants, and intermittent users of benzene from the standard.

The possibility that pharmaceutical operations could be adversely affected by the standard is very small. This is true for several reasons. First, most pharmaceutical plants use very little benzene. According to estimates contained in *Market Input/Output Studies—Benzene Consumption as a Solvent* (EPA-560/6-77-034, October 1987, p. 41), 1978 benzene consumption by pharmaceutical manufacturers was about 0.72 Gg. No companies consumed more than 1,000 Mg/yr in 1978. The commenter states that they consumed about 325 Mf/yr during 1981. Thus, it is unlikely that pharmaceutical operations would be affected by the standard because the final standard exempts equipment at plant sites that are designed to produce or use

1,000 Mg/yr or less of benzene. Second, benzene consumption by the pharmaceutical industry is declining rapidly. The market input/output study just noted estimates that consumption declined from 2.14Gg in 1976 to 0.72 Gg in 1978, a decline of about 66 percent over the 2-year period. Third, the number of companies using benzene has also declined and is expected to continue to fall. For the 2-year period 1976 to 1978, the study estimates that the number of pharmaceutical companies using benzene declined from 10 to 5. And finally, even though pharmaceutical operations that are designed to produce or use benzene in excess of 1,000 Mg/yr are subject to the standard, they have substantial equipment inventories in benzene service, and, therefore, emit benzene in enough quantity to warrant coverage by the final standard. EPA has reviewed the cost for these operations and has concluded that the cost is reasonable.

Use of cost effectiveness. Commenters felt that EPA had not selected the most cost-effective alternative as the basis for the proposed standard. One commenter said that industry's experience in air pollution abatement control programs has led it to conclude that capital costs in excess of $3,000/Mg are not cost effective and should be rejected unless the other alternatives do not substantially achieve the necessary degree of control. The commenter concluded that SOCMI data indicate that the cost effectiveness is definitely higher than the industry guideline of $3,000/Mg.

Selection of BAT was based, in response to these commenters, on an examination of the incremental cost effectiveness among various control techniques for each type of equipment covered by the standard. Whether to require more restrictive control than BAT is based on judging the risks remaining after BAT is applied and the cost and other impacts of reducing these risks. Since proposal, EPA has selected a less restrictive standard than the standard proposed in January 1981; consequently, the cost associated with the standard has decreased.

EPA based emission estimates on refinery emission factors rather than on SOCMI emission factors because recent benzene-specific emission data from refineries and chemical plants are more similar to refining units than to SOCMI units. Therefore, the commenter's conclusion that SOCMI data (discussed in "Fugitive Emission Sources of Organic Compounds—Additional Information on Emissions, Emission Reductions, and Costs," EPA-450/3-82-010) indicate that the cost effectiveness is higher than the industry guideline of $3,000/Mg is not based on the same emission estimates used by EPA. Also in contrast to the commenter, EPA bases cost effectiveness of a standard on net annualized costs rather than on capital costs. It is unclear how the commenter estimated what they called "operating costs." Using 1985 net annualized costs, however, the overall cost effectiveness for the standard is reasonable ($77/Mg of benzene).

Another commenter felt that cost effectiveness dictates that Alternative IV at a minimum, or preferably Alternative V, should have been selected instead of Alternative III in order to fulfill the mandate of Section 112. This judgment is based on the commenter's observation that the net price increase would be less than one-fourth of 1 percent in benzene prices for Alternative IV and less than 4 percent for Alternative V. The commenter considered this a "trivial price to pay for saving additional lives," noting that, in rulemaking on the vinyl chloride standard in 1975, EPA decided that a price impact as high as 10 percent would have been acceptable. The commenter added that cost estimates are usually exaggerated, and firms often develop innovative, less costly compliance techniques.

EPA has selected the final standard after considering whether the risk that remains after application of BAT warrants the incremental cost of additional control. In analyzing the cost of the standard, EPA has made reasonable attempts to ensure that the cost is not underestimated.

Even though industry sometimes may develop less costly compliance techniques, EPA considers its cost estimates reasonable. Based on these cost estimates, EPA judges that the reduction in risk that remains after application of BAT does not warrant the incremental cost of additional control.

Reporting Requirements

One commenter felt that the reporting requirements are purely for the ease of enforcement purposes, for data collection purposes, and require the submittal of duplicate information. The commenter suggested that EPA either delete the requirements or justify the need for the routine reporting requirements in determining compliance with the standard. Other commenters recognized the need for reports but suggested changes to the requirements. One commenter suggested that after submitting the initial report, plants should report only changes in the number of valves or leaks detected and repaired. Other commenters recommended that only leaks not repaired should be reported quarterly and that reporting the number of valves in each process unit is unnecessary since the number rarely changes. One of the commenters added that records of details of unsuccessful repair attempts, while possibly of interest to the owner or operator, should not be made a reporting requirement.

Effective enforcement of standards, such as this one, is important. In doing this, public officials must implement enforcement programs that are efficient in order to reduce the cost of enforcement. Reporting requirements are very helpful for effective and efficient enforcement of the standard. Contrary to what one commenter suggests, EPA is not establishing reporting requirements for the purpose of data collection and has reviewed the requirements to reduce possibly duplicative requirements. Reports will be used in a meaningful manner in conjunction with records and inspections to enforce the standard.

Reporting is an effective mechanism for reducing the cost of enforcement because reports reduce the amount of time required to conduct inspections and make it possible to reduce the number of inspections conducted by enforcement personnel. In response to comments, however, the standard was changed to require semiannual rather than quarterly reports since proposal. Semiannual records cost less to industry than quarterly reports, and they better indicate to enforcement personnel the efforts of plants to control equipment leaks than quarterly reports. Thus, EPA changed the reporting frequency from quarterly to semiannual.

Also, in response to the comments on reporting requirements, EPA reduced the amount of information that must be reported by the plant owner or operator. The information required in reports is the same information that a plant manager would likely want to evaluate his or her program. The report will include the number of leaks that occurred within the process unit during the reporting period, the number of leaks that could not be repaired within 15 days, and the general reasons for unsuccessful or delay of repair past the 15-day period. Since no reporting format is required by the standard, reports required by other regulations may simply be photocopied and submitted in compliance with the standard for equipment leaks of benzene as long as the report satisfies the informational requirements of § 61.247.

The requirement to report reasons for unsuccessful or delay of repair is necessary to allow EPA to assess whether the owner or operator is making reasonable attempts at repair and understands the workings of the standard. EPA expects that delays will occur only because repair would result in process unit shutdown. Such delays can be readily explained by the owner or operator. Since EPA does not expect many of these delays to occur, EPA considers reporting the reasons for them to be reasonable. The requirement to report the number of

leaks found will assist EPA in determining whether the number of leaks not repaired within 15 days indicates reasonable attempts at repair. EPA will gauge the significance of the number of leaks not repaired within 15 days in relation to the number of leaks found.

The requirements in the final standard involve recordkeeping along with reporting. This provides enforcement of the standard in an effective and efficient manner. It should fit well with management of the standard by plant personnel. The recordkeeping requirements are the minimum that could be implemented without precluding the possibility of enforcing the standard. The recordkeeping requirements are essentially the same as those proposed and reflect a level of documentation that plant personnel would require to evaluate implementation of the standard. Without retrospective data, inspections would be useless and reporting would be impossible. In the proposed standards, EPA included a requirement to report leak location and I.D. number. This would have allowed EPA to determine whether certain equipment leaks of benzene in a plant were causing repeated problems. However, in order to reduce reporting requirements for industry and to reduce EPA review requirements, EPA has decided to eliminate leak location and I.D. number from the reporting requirements.

During the first 2 years of the program, the average annual burden of reporting and recordkeeping to industry would be about 20 person-years. The burden is distributed among about 240 process units and, on an annual basis, represents about 1 person-month per process unit. Over the same period, the average annual burden of reporting, recordkeeping, and inspections to EPA would be about 10 person-years. This program provides a reasonable level of compliance monitoring.

Incorporation of Volatile Hazardous Air Pollutant Standards

Other standards for volatile hazardous air pollutants (VHAP), if established, will likely be similar to the standard selected by EPA for equipment leaks of benzene. [This will occur unless, for a specific VHAP, BAT is different, or EPA selects a control level associated with a technology more stringent thant BAT.] Subpart V (40 CFR Part 61) is being promulgated as requirements for equipment leaks of VHAP. Subpart J, which promulgates the specific standard for equipment leaks of benzene, refers to Subpart V as the substantive requirements for all the sources covered by Subpart J. Standards for other VHAP, if proposed, would use Subpart V as a general guideline for the standard for equipment leaks of the VHAP. The technology selected as the basis for Subpart J would be used as the basis for the analyses of other VHAP. This provides an extra degree of certainty for public commenters and an effective mechanism to incorporate appropriate technological changes to all standards for equipment leaks of VHAP.

Docket

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify and locate documents readily so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and final standard EPA responses to significant comments, the contents of the docket will serve as the record in case of judicial review, except for interagency review materials [section 307(d)(7)(A)].

Miscellaneous

The effective date of this regulation is June 6, 1984. Section 112 of the Clean Air Act provides that national

emission standards for hazardous air pollutants become effective upon promulgation and apply to all existing and new sources.

As prescribed by section 112, promulgation of this standard was preceded by the Administrator's determination that benzene presents a significant carcinogenic risk to human health and is, therefore, a hazardous air pollutant as defined in section 112(a)(1) of the Act. Benzene was added to the list of hazardous air pollutants on June 8, 1977. In accordance with section 117 of the Act, publication of this promulgated standard was preceded by consultation with appropriate advisory committees, independent experts, and Federal departments and agencies. In addition, members of the benzene task group of the Interagency Regulatory Liaison Group (IRLG), representing the EPA the OSHA, the Food and Drug Administration, and the Consumer Product Safety Commission, have met (when the IRLG existed) and reviewed the standard to ensure that each rule is jointly understood and is consistent with their programs.

An economic impact assessment was prepared for the regulation and for other regulatory alternatives. The economic impact assessment for the standard is included in the BID for the proposed and promulgated standard.

The Paperwork Reduction Act (PRA) of 1980 (Pub. L. 96-511) requires clearance from the Office of Management and Budget (OMB) of reporting and recordkeeping requirements that qualify as an "information collection request" under the PRA, which affect 10 or more plants for the standard. OMB is currently clearing information collection requests for a period of 2 years. For the purposes of OMB's review, an analysis of the burden associated with the reporting and recordkeeping requirements of this regulation has been made. During the first 2 years of this regulation, the average annual burden of the reporting and recordkeeping requirements for the benzene

fugitive standard would be about 20 person-years, based on an average of about 240 process units per year.

Information collection requirements associated with this regulation (Subpart A and Subpart J of Part 61) have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, and have been assigned OMB control number 2060-0068.

Under Executive Order 12291, the EPA is required to judge whether this regulation is a "major rule" and therefore subject to certain requirements of the Order. The EPA has determined that this regulation will result in none of the adverse economic effects set forth in Section 1 of the Order as grounds for finding a regulation to be a "major rule." This regulation is not a major because: (1) Nationwide annual compliance costs are not as great as the threshold of $100 million; (2) the standard does not significantly increase prices or producton costs; and (3) the standard does not cause significant, adverse effects on domestic competition, employment, investment, productivity, innovation, or competition in foreign markets.

This regulation was submitted to the OMB for review as required by Executive Order 12291. Any comments from the OMB to the EPA and any EPA response to those comments are included in Docket No. A-79-27 (benzene fugitive). The docket is available for public inspection at the EPA's Central Docket Section, West Tower Lobby, Gallery 1, Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460.

The Regulatory Flexibility Act of 1980 requires that adverse effects of all Federal regulations upon small businesses be identified. According to current Small Business Administration guidelines, a small business that manufactures cyclic crudes and cyclic intermediates, pharmaceuticals, and many other chemicals is one that has 750 employees or fewer. Currently, very few of the businesses

in the existing industry employ fewer than 750 people. Even if facilities owned by small businesses do become subject to the standard, none will be affected adversely. This conclusion is based on the fact that, in doing the economic analysis for the benzene fugitives standard, the price increase and profitability impacts have been estimated from the perspective of the smaller process units in operation. Therefore, the finding that the annualized cost of the standard will be very small (about $2,000/yr) for units affected by the standard accurately reflects the impacts for benzene fugitive facilities owned by small businesses.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 61

Asbestos, Beryllium, Hazardous substances, Mercury, Reporting and recordkeeping requirements, Vinyl chloride.

Dated: May 23, 1984.
William D. Ruckelshaus.
Administrator.

PART 61—[AMENDED]

40 CFR Part 61 is amended by adding Subparts J and V and by adding three subparagraphs to paragraph (a) of § 61.18 as follows:

1. By adding Subparts J and V to 40 CFR Part 61 as follows:

Subpart J—National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene

Sec.
61.110 Applicability and designation of sources.
61.111 Definitions.
61.112 Standards.
61.113-61.119 [Reserved].

* * * *

Subpart V—National Emission Standard for Equipment Leaks (Fugitive Emission Sources)

Sec.

61.240 Applicabiilty and designation of sources.
61.241 Definitions.
61.242-1 Standards: General.
61.242-2 Standards: Pumps.
61.242-3 Standards: Compressors.
61.242-4 Standards: Pressure relief devices in gas/vapor service.
61.242-5 Standards: Sampling connection systems.
61.242-6 Standards: Open-ended valves or lines.
61.242-7 Standards: Valves.
61.242-8 Standards: Pressure relief devices in liquid service and flanges and other connectors.
61.242-9 Standards: Product accumulator vessels.
61.242-10 Standards: Delay of repair.
61.242-11 Standards: Closed-vent systems and control devices.
61.243-1 Alternative standards for valves in UHAP Service—allowable percentage of valves leaking.
61.243-2 Alternative standards for valves in UHAP service—skip period leak detection and repair.
61.244 Alternative means of emission limitation.
61.245 Test methods and procedures.
61.246 Recordkeeping requirements.
61.247 Reporting requirements.

Authority: Sections 112 and 301(a) of the Clean Air Act, as amended [42 U.S.C. 7412, 7601(a)], and additional authority as noted below.

Subpart J—National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene

§ 61.110 Applicability and designation of sources.

(a) The provisions of this subpart apply to each of the following sources that are intended to operate in benzene service: pumps, compressors, pressure relief devices, sampling connections, systems, open-ended valves or lines,

valves, flanges and other connectors, product accumulator vessels, and control devices or systems required by this subpart.

(b) The provisions of this subpart do not apply to sources located in coke by-product plants.

(c)(1) If an owner or operator applies for one of the exemptions in this paragraph, then the owner or operator shall maintain records as required in § 61.246(i).

(2) Any equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year is exempt from the requirements of § 61.112.

(3) Any process unit (defined in § 61.241) that has no equipment in benzene service is exempt from the requirements of § 61.112.

(d) While the provisions of this subpart are effective, a source to which this subpart applies that is also subject to the provisions of 40 CFR Part 60 only will be required to comply with the provisions of this subpart.

§ 61.111 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act, in Subpart A of Part 61, or in Subpart V of Part 61, and the following terms shall have the specific meanings given them:

"In benzene service" means that a piece of equipment either contains or contacts a fluid (Liquid or gas) that is at least 10 percent benzene by weight as determined according to the provisions of § 61.245(d). The provisions of § 61.245(d) also specify how to determine that a piece of equipment is not in benzene service.

"Semiannual" means a 6-month period; the first semiannual period concludes on the last day of the last month during the 180 days following initial startup for new sources; and the first semiannual period concludes on the last day of the last full month during the 180 days after June 6, 1984 for existing sources.

§ 61.112 Standards.

(a) Each owner or operator subject to the provisions of this subpart shall comply with the requirements of Subpart V of this part.

(b) An owner or operator may elect to comply with the requirements of § 61.243-1 and § 61.243-2.

(c) An owner or operator may apply to the Administrator for a determination of an alternative means of emission limitation that achieves a reduction in emissions of benzene at least equivalent to the reduction in emissions of benzene achieved by the controls required in this subpart. In doing so, the owner or operator shall comply with requirements of § 61.244.

§ 61.113-61.119 [Reserved]

* * * *

Subpart V—National Emission Standard for Equipment Leaks (Fugitive Emission Sources)

§ 61.240 Applicability and designation of sources.

(a) The provisions of this subpart apply to each of the following sources that are intended to operate in volatile hazardous air pollutant (VHAP) service: pumps, compressors, pressure relief devices, sampling connection systems, open-ended valves or lines, valves, flanges and other connectors, product accumulator vessels, and control devices or systems required by this subpart.

(b) The provisions of this subpart apply to the sources listed in paragraph (a) after the date of promulgation of a specific subpart in Part 61.

(c) While the provisions of this subpart are effective, a source to which this subpart applies that is also subject to the provisions of 40 CFR Part 60 only will be required to comply with the provisions of this subpart.

§ 61.241 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act, in Subpart A of Part 61, or in specific subparts of Part 61; and the following terms shall have specific meaning given them:

"Closed-vent system" means a system that is not open to atmosphere and that is composed of piping, connections, and, if necessary, flow-inducing devices that transport gas or vapor from a piece or pieces of equipment to a control device.

"Connector" means, flanged, screwed, welded, or other joined fittings used to connect two pipe lines or a pipe line and a piece of equipment.

"Control device" means an enclosed combustion device, vapor recovery system, or flare.

"Double block and bleed system" means two block valves connected in series with a bleed valve or line that can vent the line between the two block valves.

"Equipment" means each pump, compressor, pressure relief device, sampling connection system, open-ended valve or line, valve, flange or other connector, product accumulator vessel in VHAP service, and any control devices or systems required by this subpart.

"First attempt at repair" means to take rapid action for the purpose of stopping or reducing leakage of organic material to atmosphere using best practices.

"In gas/vapor service" means that a piece of equipment contains process fluid that is in the gaseous state at operating conditions.

"In liquid service" means that a piece of equipment is not in gas/vapor service.

"*In-situ* sampling systems" means nonextractive samplers or in-line samplers.

"In vacuum service" means that equipment is operating at an internal pressure which is at least 5 kilopascals (kPa) below ambient pressure.

"In VHAP service" means that a piece of equipment either contains or contacts a fluid (liquid or gas) that is at least 10 percent by weight a volatile hazardous air pollutant (VHAP) as determined according to the provisions of § 61.245(d). The provisions of § 61.245(d) also specify how to determine that a piece of equipment is not in VHAP service.

"In VOC service" means, for the purpose of this subpart, that (a) the piece of equipment contains or contacts a process fluid that is at least 10 percent VOC by weight (see 40 CFR 60.2 for the definition of volatile organic compound or VOC and 40 CFR 60.458(d) to determine whether a piece of equipment is not in VOC service) and (b) the piece of equipment is not in liquid service as defined in 40 CFR 60.481.

"Open-ended valve or line" means any valve, except pressure relief valves, having one side of the valve seat in contact with process fluid and one side open to atmosphere, either directly or through open piping.

"Pressure release" means the emission of materials resulting from the system pressure being greater than the set pressure of the pressure relief device.

"Process unit" means equipment assembled to produce a VHAP or its derivatives as intermediates or final products, or equipment assembled to use a VHAP in the production of a product. A process unit can operate independently if supplied with sufficient feed or raw materials and sufficient product storage facilities.

"Process unit shutdown" means a work practice or operational procedure that stops production from a process unit or part of a process unit. An unscheduled work practice or operational procedure that stops production from a process unit or part of a process unit for less than 24 hours is not a process unit shutdown. The use of spare equipment and technically feasible bypassing of equipment without stopping production are not process unit shutdowns.

"Product accumulator vessel" means any distillate receiver, bottoms receiver, surge control vessel, or product separator in VHAP service that is vented to atmosphere either directly or through a vacuum-producing system. A product accumulator vessel is in VHAP service if the liquid or the vapor in the vessel is at least 10 percent by weight VHAP.

"Repaired" means that equipment is adjusted, or otherwise altered, to eliminate a leak as indicated by one of the following: an instrument reading of 10,000 ppm or greater, indication of liquids dripping, or indication by a sensor that a seal or barrier fluid system has failed.

"Semiannual" means a 6-month period; the first semiannual period concludes on the last day of the last month during the 180 days following initial startup for new sources; and the first semiannual period concludes on the last day of the last full month during the 180 days after the effective date of a specific subpart that references this subpart.

"Sensor" means a device that measures a physical quantity or the change in a physical quantity, such as temperature, pressure, flow rate, pH, or liquid level.

"Volatile Hazardous Air Pollutant" or "VHAP" means a substance regulated under this subpart for which a standard for equipment leaks of the substance has been proposed and promulgated. Benzene is a VHAP.

§ 61.242-1 Standards: General.

(a) Each owner or operator subject to the provisions of this subpart shall demonstrate compliance with the requirements of § 61.242-1 to § 61.242-11 for each new and existing source as required in 40 CFR 61.05, except as provided in § 61.243 and § 61.244.

(b) Compliance with this subpart will be determined by review of records, review of performance test results, and inspection using the methods and procedures specified in § 61.245.

(c)(1) An owner or operator may request a determination of alternative means of emission limitation to the requirements of §§ 61.242-2, 61.242-3, 61.242-5, 61.242-7, 61.242-8, 61.242-9 and 61.242-11 as provided in § 61.244.

(2) If the Administrator makes a determination that a means of emission limitation is at least a permissible alternative to the requirements of §§ 61.242-2, 61-242-3, 61-242-5, 61.242-6, 61.242-7, 61.242-8, 61.242-9 or 61.242-11, an owner or operator shall comply with the requirements of that determination.

(d) Each piece of equipment to which this subpart applies shall be marked in such a manner that it can be distinguished readily from other pieces of equipment.

(e) Equipment that is in vacuum service is excluded from the requirements of § 61.242-2, to § 61.242-11 if it is identified as required in § 61.246(e)(5).

§ 61.242-2 Standards: Pumps.

(a)(1) Each pump shall be monitored monthly to detect leaks by the methods specified in § 61.245(b), except as provided in § 61.242-1(c) and paragraphs (d), (e), and (f) of this section.

(2) Each pump shall be checked by visual inspection each calendar week for indications of liquids dripping from the pump seal.

(b)(1) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(2) If there are indications of liquids dripping from the pump seal, a leak is detected.

(c)(1) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 61.242-10.

(2) A first attempt at repair shall be made no later than 5 calendar days after each leak is detected.

(d) Each pump equipped with a dual mechanical seal system that includes a barrier fluid system is exempt from the requirements of paragraph (a), provided the following requirements are met:

(1) Each dual mechanical seal system is:

(i) Operated with the barrier fluid at a pressure that is at all times greater than the pump stuffing box pressure; or

(ii) Equipped with a barrier fluid degassing reservoir that is connected by a closed-vent system to a control device that complies with the requirements of § 61.242-11; or

(iii) Equipped with a system that purges the barrier fluid into a process stream with zero VHAP emissions to atmosphere.

(2) The barrier fluid is not in VHAP service and, if the pump covered by standards under 40 CFR Part 60, is not in VOC service.

(3) Each barrier fluid system is equipped with a sensor that will detect failure of the seal system, the barrier fluid system, or both.

(4) Each pump is checked by visual inspection each calendar week for indications of liquids dripping from the pump seal.

(5)(i) Each sensor as described in paragraph (d)(3) of this section is checked daily or is equipped with a audible alarm, and

(ii) The owner or operator determines, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.

(6)(i) If there are indications of liquids dripping from the pump seal or the sensor indicates failure of the seal system, the barrier fluid system, or both based on the

criterion determined in paragraph (d)(5)(ii), a leak is detected.

(ii) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 61.242-10.

(iii) A first attempt at repair shall be made no later than 5 calendar days after each leak is detected.

(e) Any pump that is designated, as described in § 61.246(e)(2), for no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, is exempt from the requirements of paragraphs (a), (c), and (d) if the pump:

(1) Has no externally actuated shaft penetrating the pump housing,

(2) Is demonstrated to be operating with no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as measured by the method specified in § 61.245(c), and

(3) Is tested for compliance with paragraph (e)(2) initially upon designation, annually, and at other times requested by the Administrator.

(f) If any pump is equipped with a closed-vent system capable of capturing and transporting any leakage from the seal or seals to a control device that complies with the requirements of § 61.242-11, it is exempt from the requirements of paragraphs (a)-(e).

§ 61.242-3 Standards: Compressors.

(a) Each compressor shall be equipped with a seal system that includes a barrier fluid system and that prevents leakage of process fluid to atmosphere, except as provided in § 61.242(1(c) and paragraphs (h) and (i) of this section.

(b) Each compressor seal system as required in paragraph (a) shall be:

(1) Operated with the barrier fluid at a pressure that is greater than the compressor stuffing box pressure; or

(2) Equipped with a barrier fluid system that is connected by a closed-vent system to a control device that complies with the requirements of § 61.242-11; or

(3) Equipped with a system that purges the barrier fluid into a process stream with zero VHAP emissions to atmosphere.

(c) The barrier fluid shall not be in VHAP service and, if the compressor is covered by standards under 40 CFR Part 60, shall not be in VOC service.

(d) Each barrier fluid system as described in paragraphs (a)-(c) of this section shall be equipped with a sensor that will detect failure of the seal system, barrier fluid system, or both.

(e)(1) Each sensor as required in paragraph (d) shall be checked daily or shall be equipped with an audible alarm.

(2) The owner or operator shall determine, based on design considerations and operating experience, a criterion that indicates failure of the seal system, the barrier fluid system, or both.

(f) If the sensor indicates failure of the seal system, the barrier fluid system, or both based on the criterion determined under paragraph (e)(2) of this section, a leak is detected.

(g)(1) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 61.242-10.

(2) A first attempt at repair shall be made no later than 5 calendar days after each leak is detected.

(h) A compressor is exempt from the requirements of paragraphs (a) and (b) if it is equipped with a closed-vent system capable of capturing and transporting any leakage from the seal to a control device that complies with the requirements of § 61.242-11, except as provided in paragraph (i).

(i) Any compressor that is designated, as described in § 61.246(e)(2), for no detectable emission as indicated by an instrument reading of less than 500 ppm above background is exempt from the requirements of paragraphs (a)-(h) if the compressor:

(1) Is demonstrated to be operating with no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as measured by the method specified in § 61.245(c); and

(2) Is tested for compliance with paragraph (i)(1) initially upon designation, annually, and at other times requested by the Administrator.

§ 61.242-4 Standards: Pressure relief devices in gas/vapor service.

(a) Except during pressure releases, each pressure relief device in gas/vapor service shall be operated with no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as measured by the method specified in § 61.245(c).

(b)(1) After each pressure release, the pressure relief device shall be returned to a condition of no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, as soon as practicable, but no later than 5 calendar days after each pressure release.

(2) No later than 5 calendar days after the pressure release, the pressure relief device shall be monitored to confirm the condition of no detectable emissions, as indi-

cated by an instrument reading of less than 500 ppm above background, as measured by the method specified in § 61.245(c).

(c) Any pressure relief device that is equipped with a closed-vent system capable of capturing and transporting leakage from the pressure relief device to a control device as described in § 61.242-11 is exempt from the requirements of paragraph (a) and (b).

§ 61.242-5 Standards: Sampling connecting systems.

(a) Each sampling connection system shall be equipped with a closed-purge system or closed vent system, except as provided in § 61.242-1(c).

(b) Each closed-purge system or closed-vent system as required in paragraph (a) shall:

(1) Return the purged process fluid directly to the process line with zero VHAP emissions to atmosphere; or

(2) Collect and recycle the purged process fluid with zero VHAP emissions to atmosphere; or

(3) Be designed and operated to capture and transport all the purged process fluid to a control device that complies with the requirements of § 61.242-11.

(c) *In-situ* sampling systems are exempt from the requirements of paragraphs (a) and (b).

§ 61.242-6 Standards: Open-ended valves or lines.

(a)(1) Each open-ended valve or line shall be equipped with a cap, blind flange, plug, or a second valve, except as provided in § 61.242-1(c).

(2) The cap, blind flange, plug, or second valve shall seal the open end at all times except during operations requiring process fluid flow through the open-ended valve or line.

(b) Each open-ended valve or line equipped with a second valve shall be operated in a manner such that the valve on the process fluid end is closed before the second valve is closed.

(c) When a double block and bleed system is being used, the bleed valve or line may remain open during operations that require venting the line between the block valves but shall comply with paragraph (a) at all other times.

§ 61.242-7 Standards: Valves.

(a) Each valve shall be monitored monthly to detect leaks by the method specified in § 61.245(b) and shall comply with paragraphs (b)-(e), except as provided in paragraphs (f), (g), and (h) of this section, §§ 61.243-1 or 61.243-2, and § 61.242-1(c).

(b) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(c)(1) Any valve for which a leak is not detected for 2 successive months may be monitored the first month of every quarter, beginning with the next quarter, until a leak is detected.

(2) If a leak is detected, the valve shall be monitored monthly until a leak is not detected for 2 successive months.

(d)(1) When a leak is detected, it shall be repaired as soon as practicable, but no later than 15 calendar days after the leak is detected, except as provided in § 61.242-10.

(2) A first attempt at repair shall be made no later than 5 calender days after each leak is detected.

(e) First attempts at repair include, but are not limited to, the following best practices where practicable:

(1) Tightening of bonnet bolts;

(2) Replacement of bonnet bolts;

(3) Tightening of packing gland nuts; and

(4) Injection of lubricant into lubricated packing.

(f) Any valve that is designated, as described in § 61.246(e)(2), for no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, is exempt from the requirements of paragraph (a) if the valve:

(1) Has no external actuating mechanism in contact with the process fluid;

(2) Is operated with emissions less than 500 ppm above background, as measured by the method specified in § 61.245(c); and

(3) Is tested for compliance with paragraph (f)(2) initially upon designation, annually, and at other times requested by the Administrator.

(g) Any valve that is designated, as described in § 61.246(f)(1), as an unsafe-to-monitor valve is exempt from the requirements of paragraph (a) if:

(1) The owner or operator of the valve demonstrates that the valve is unsafe to monitor because monitoring personnel would be exposed to an immediate danger as a consequence of complying with paragraph (a); and

(2) The owner or operator of the valve has a written plan that requires monitoring of the valve as frequent as practicable during safe-to-monitor times.

(h) Any valve that is designated, as described in § 61.246(f)(2), as a difficult-to-monitor valve is exempt from the requirements of paragraph (a) if:

(1) The owner or operator of the valve demonstrates that the valve cannot be monitored without elevating the monitoring personnel more than 2 meters above a support surface;

(2) The process unit within which the valve is located is an existing process unit; and

(3) The owner or operator of the valve follows a written plan that requires monitoring of the valve at least once per calendar year.

§ 61.242-8 Standards: Pressure relief devices in liquid service and flanges and other connectors.

(a) Pressure relief devices in liquid service and flanges and other connectors shall be monitored within 5 days by the method specified in § 61.245(b) if evidence of a potential leak is found by visual, audible, olfactory, or any other detection method.

(b) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(c)(1) When a leak is detected, it shall be repaired as soon as practicable, but not later than 15 calendar days after it is detected, except as provided in § 61.242.10.

(2) The first attempt at repair shall be made no later than 5 calendar days after each leak is detected.

(d) First attempts at repair include, but are not limited to, the best practices described under § 61.242-7(e).

§ 61.242-9 Standards: Product accumulator vessels.

Each product accumulator vessel shall be equipped with a closed-vent system capable of capturing and transporting any leakage from the vessel to a control device as described in § 61.242-11.

§ 61.242-10 Standards: Delay of repair.

(a) Delay of repair of equipment for which leaks have been detected will be allowed if the repair is technically infeasible without a process unit shutdown. Repair of this equipment shall occur before the end of the next process unit shutdown.

(b) Delay of repair of equipment for which leaks have been detected will be allowed for equipment that is isolated from the process and that does not remain in VHAP service.

(c) Delay of repair for valves will be allowed if:

(1) The owner or operator demonstrates that emissions of purged material resulting from immediate repair are greater than the fugitive emissions likely to result from delay or repair, and

(2) When repair procedures are effected, the purged material is collected and destroyed or recovered in a control device complying with § 61.242-11.

(d) Delay of repair for pumps will be allowed if:

(1) Repair requires the use of a dual mechanical seal system that includes a barrier fluid system, and

(2) Repair is completed as soon as practicable, but not later than 6 months after the leak is detected.

(e) Delay of repair beyond a process unit shutdown will be allowed for a valve if valve assembly replacement is necessary during the process unit shutdown, valve assembly supplies have been depleted, and valve assembly supplies had been sufficiently stocked before the supplies were depleted. Delay of repair beyond the next process unit shutdown will not be allowed unless the next process unit shutdown occurs sooner than 6 months after the first process unit shutdown.

§ 61.242-11 Standards: Closed-vent systems and control devices.

(a) Owners or operators of closed-vent systems and control devices used to comply with provisions of this subpart shall comply with the provisions of this section.

(b) Vapor recovery systems (for example, condensers and adsorbers) shall be designed and operated to recover

the organic vapors vented to them with an efficiency of 95 percent or greater.

(c) Enclosed combustion devices shall be designed and operated to reduce the VHAP emissions vented to them with an efficiency of 95 percent or greater or to provide a minimum residence time of 0.50 seconds at a minimum temperature of 760°C.

(d)(1) Flares shall be designed for an operated with no visible emissions as determined by the methods specified in § 61.245(e), except for periods not to exceed a total of 5 minutes during any 1 consecutive hours.

(2) Flares shall be operated with a flame present at all times, as determined by the methods specified in § 61.245.(e).

(3) Flares shall be used only with the net heating value of the gas being combusted being 11.2 MJ/scm (300 Btu/scf) or greater if the flare is steam-assisted or air-assisted; or with the net heating value of the gas being combusted being 7.45 MJ/scm or greater if the flare is nonassisted. The net heating value of the gas being combusted shall be determined by the method specified in § 61.245(e).

(4) Steam-assisted and nonassisted flares shall be designed for and operated with an exit velocity, as determined by the method specified in § 61.245(e)(4), less than 18 m/sec (60 ft/sec).

(5) Air-assisted flares shall be designed and operated with an exit velocity less than the velocity, v_{max}, as determined by the method specified in §61.245(e)(5).

(6) Flares used comply with this subpart shall be steam-assisted, air-assisted, or nonassisted.

(e) Owners or operators of control devices that are used to comply with the provisions of this subpart shall monitor these control devices to ensure that they are operated and maintained in conformance with their design.

(f)(1) Closed-vent systems shall be designed for and operated with no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background and by visual inspections, as determined by the methods specified as § 61.245(c).

(2) Closed-vent systems shall be monitored to determine compliance with this section initially in accordance with § 61.05, annually, and at other times requested by the administrator.

(3) Leaks, as indicated by an instrument reading greater than 500 ppm and visual inspections, shall be repaired as soon as practicable, but not later than 15 calendar days after the leak is detected.

(4) A first attempt at repair shall be made no later than 5 calendar days after the leak is detected.

(g) Closed-vent systems and control devices use to comply with provisons of this subpart shall be operated at all times when emissions may be vented to them.

§ 61.243-1 Alternative standards for valves in VHAP service—allowable percentage of valves leaking.

(a) An owner or operator may elect to have all valves within a process unit to comply with an allowable percentage of valves leaking of equal to or less than 2.0 percent.

(b) The following requirements shall be met if an owner or operator decided to comply with an allowable percentage of valves leaking.

(1) An owner or operator must notify the Administrator that the owner or operator has elected to have all valves within a process unit to comply with the allowable percentage of valves leaking before implementing this alternative standard, as specified in § 61.247(d).

(2) A performance test as specified in paragraph (c) of this section shall be conducted initially upon designa-

tion, annually, and at other times requested by the Administrator.

(3) If a valve leak is detected, it shall be repaired in accordance with § 61.242-7(d) and (e).

(c) Performance test shall be conducted in the following manner:

(1) All valves in VHAP service within the process unit shall be monitored within 1 week by the methods specified in § 61.245(b).

(2) If an instrument reading of 10,000 ppm or greater is measured, a leak is detected.

(3) The leak percentage shall be determined by dividing the number of valves in VHAP service for which leaks are detected by the number of valves in VHAP service within the process unit.

(d) Owner or operators who elect to have all valves comply with this alternative standard shall not have a process unit with a leak percentage greater than 2.0 percent.

(e) If an owner or operator decides no longer to comply with § 61.243-1, the owner or operator must notify the Administrator in writing that the work practice standard described in § 61.242-7(a)-(e) will be followed.

§ 61.243-2 Alternative standards for valves in VHAP service—skip period leak detection and repair.

(a)(1) An owner or operator may elect for all valves within a process unit to comply with one of the alternative work practices specified in paragraphs (b)(2) and (3) of this section.

(2) An owner or operator must notify the Administrator before implementing one of the alternative work practices, as specified in § 61.247(d).

(b)(1) An owner or operator shall comply initially with the requirements for valves, as described in § 61.242-7.

(2) After 2 consecutive quarterly leak detection periods with the percentage of valves leaking equal to or less than 2.0, an owner or operator may begin to skip 1 of the quarterly leak detection periods for the valves in VHAP service.

(3) After 5 consecutive quarterly leak detection periods with the percentage of valves leaking equal to or less than 2.0, an owner or operator may begin to skip 3 of the quarterly leak detection periods for the valves in VHAP service.

(4) If the percentage of valves leaking is greater than 2.0, the owner or operator shall comply with the requirements as described in § 61.242-7 but may again elect to use this section.

§ 61.244 Alternative means of emission limitation.

(a) Permission to use an alternative means of emission limitation under Section 112(e)(3) of the Clean Air Act shall be governed by the following procedures:

(b) Where the standard is an equipment, design, or operational requirement:

(1) Each owner or operator applying for permission shall be responsible for collecting and verifying test data for an alternative means of emission limitation.

(2) The Administrator will compare test data for the means of emission limitation to test data for the equipment, design, and operational requirements.

(3) The Administrator may condition the permission on requirements that may be necessary to assure operation and maintenance to achieve the same emission reduction as the equipment, design, and operational requirements.

(c) Where the stanadrd is a work practice:

(1) Each owner or operator applying for permission shall be responsible for collecting and verifying test data for an alternative means of emission limitation.

(2) For each source for which permission is requested the emission reduction achieved by the required work practices shall be demonstrated for a minimum period of 12 months.

(3) For each source for which permission is requested the emission reduction achieved by the alternative means of emission limitation shall be demonstrated.

(4) Each owner or operator applying for permission shall commit in writing each source to work practices that provide for emission reductions equal to or greater than the emission reductions achieved by the required work practices.

(5) The Administrator will compare the demonstrated emission reduction for the alternative means of emission limitation to the demonstrated emission reduction for the required work practices and will consider the commitment in paragraph (c)(4).

(6) The Administrator may condition the permission on requirements that may be necessary to assure operation and maintenance to achieve the same emission reduction as the required work practices of this subpart.

(d) An owner or operator may offer a unique approach to demonstrate the alternative means of emission limitation.

(e)(1) Manufacturers of equipment used to control equipment leaks of a VHAP may apply to the Administrator for permission for an alternative means of emission limitation that achieves a reduction in emissions of the VHAP achieved by the equipment, design, and operational requirements of this subpart.

(2) The Administrator will grant permission according to the provisions of paragraphs (b), (c), and (d).

§ 61.245 Test methods and procedures.

(a) Each owner or operator subject to the provisions of this subpart shall comply with the test methods and procedures requirements provided in this section.

(b) Monitoring, as required in § 61.242, § 61.243, and § 61.244, shall comply with the following requirements:

(1) Monitoring shall comply with Reference Method 21.

(2) The detection instrument shall meet the performance criteria of Reference Method 21.

(3) The instrument shall be calibrated before use on each day of its use by the procedures specified in Reference Method 21.

(4) Calibration gases shall be:

(i) Zero air (less than 3 ppm of hydrocarbon in air); and

(ii) A mixture of ethane or n-hexane and air at a concentration of approximately, but less than, 10,000 ppm methane or n-hexane.

(5) The instrument probe shall be traversed around all potential leak interfaces as close to the interface as possible as described in Reference Method 21.

(c) When equipment is tested for compliance with no detectable emissions, as required in §§ 61.242-2(e), 61.242-3(i), 61.242-4, 61.242-7(f), and 61.242-11(f), the test shall comply with the following requirements:

(1) The requirements of paragraphs (b)(1)-(4) shall apply.

(2) The background level shall be determined, as set forth in Reference Method 21.

(3) The instrument probe shall be traversed around all potential leak interfaces as close to the interface as possible as described in Reference Method 21.

(4) The arithmetic difference between the maximum concentration indicated by the instrument and the background level is compared with 655 upm for determining compliance.

(d)(1) Each piece of equipment within a process unit that can conceivably contain equipment in VHAP service is presumed to be in VHAP service unless an owner or operator demonstrates that the piece of equipment is not in VHAP service. For a piece of equipment to be considered not in VHAP service, it must be determined that the percent VHAP content can be reasonably expected never to exceed 10 percent by weight. For purposes of determining the percent VHAP content of the process fluid that is contained in or contacts equipment, procedures that conform to the methods described in ASTM Method D-2267 (incorporated by the reference as modified in § 61.18) shall be used.

(2)(i) An owner or operator may use engineering judgment rather than the procedures in paragraph (d)(1) of this section to demonstrate that the percent VHAP content does not exceed 10 percent by weight, provided that the engineering judgment demonstrates that the VHAP content clearly does not exceed 10 percent by weight. When an owner or operator and the Administrator do not agree on whether a piece of equipment is not in VHAP service, however, the procedures in paragraph (d)(1) of this section shall be used to resolve the disagreement.

(ii) If an owner or operator determines that a piece of equipment is in VHAP service, the determination can be revised only after following the procedures in paragraph (d)(1) of this section.

(3) Samples used in determining the percent VHAP content shall be representative of the process fluid that is contained in or contacts the equipment or the gas being combusted in the flare.

(e)(1) Reference Method 22 shall be used to determine compliance of flares with the visible emission provisions of this subpart.

(2) The presence of a flare pilot flame shall be monitored using a thermocouple or any other equivalent device to detect the presence of a flame.

(3) The net heating value of the gas being combusted in a flare shall be calculated using the following equation:

$$H_T = K \left(\sum_{i=1}^{n} C_i H_i \right)$$

Where:

H_T = Net heating value of the sample, MJ/scm: where net enthalpy per mole of offgas is based on combustion at 25°C and 760 mm Hg, but the standard temperature for determiinng the volume corresponding to one mole is 20°C.

K = Constant, 1.740×10^7 (1/ppm) (g mole/scm) (MJ/kcal) where standard temperature for (g mole/scm) is 20°C.

C_i = Concentration of sample component i in ppm, as measured by Reference Method 18 of Appendix A of 40 FR Part 60 and ASTM D2504-67 (reapproved 1977) (incorporated by reference as specified in § 61.18).

H_i = Net heat of combustion of sample component i, kcal/g mole. The heats of combustion may be determined using ASTM D2382-76 (incorporated by reference as specified in § 61.18) if published values are not available or cannot be calculated.

(4) The actual exit velocity of a flare shall be determined by dividing the volumetric flowrate (in units of standard temperature and pressure), as determined by Reference Method 2, 2A, 2C, or 2D, as appropriate, by the unobstructed (free) cross section area of the flare tip.

(5) The maximum permitted velocity, V_{max}, for air-assisted flares shall be determined by the following equation:

$$VMax = 8.76 + 0.7084(H_T)$$

Where:

VMax = Maximum permitted velocity, m/sec 8.706 = Constant.

0.7084 = Constant.

H_T = The net heating value as determined in paragraph (e)(3) of this section.

(Sec. 114 of the Clean Air Act as amended (42 U.S.C. 7414).)

§ 61.246 Recordkeeping requirements.

(a)(1) Each owner or operator subject to the provisions of this subpart shall comply with the recordkeeping requirements of this section.

(2) An owner or operator of more than one process unit subject to the provisions of this subpart may comply with the recordkeeping requirements for these process units in one recordkeeping system if the system identifies each record by each process unit.

(b) When each leak is detected as specified in §§ 61.242-2, 61.242-3, 61.242-7, and 61.242-8, the following requirements apply:

(1) A weatherproof and readily visible identification, marked with the equipment identification number, shall be attached to the leaking equipment.

(2) The identification on a valve may be removed after it has been monitored for 2 successive months as specified in § 61.242-7(c) and no leak has been detected during those 2 months.

(3) The identification on equipment, except on a valve, may be removed after it has been repaired.

(c) When each leak, is detected as specified in §§ 61.242-2, 61.242-3, 61.242-7, and 61.242-8, the following information shall be recorded in a log and shall be kept for 2 years in a readily accessible location:

(1) The instrument and operator identification numbers and the equipment identification number.

(2) The date the leak was detected and the dates of each attempt to repair the leak.

(3) Repair methods applied in each attempt to repair the leak.

(4) "Above 10,000" if the maximum instrument reading measured by the methods specified in § 61.245(a) after each repair attempt is esqual to or greater than 10,000 ppm.

(5) "Repair delayed" and the reason for the delay if a leak is not repaired within 15 calendar days after discovery of the leak.

(6) The signature of the owner or operator (or designate) whose decision it was that repair could not be effected without a process shutdown.

(7) The expected date of successful repair of the leak if a leak is not repaired within 15 calendar days.

(8) Dates of process unit shutdowns that occur while the equipment is unrepaired.

(9) The date of successful repair of the leak.

(d) The following information pertaining to the design requirements for closed-vent systems and control devices described in § 61.242-11 shall be recorded and kept in a readily accessible location:

(1) Detailed schematics, design specifications, and piping and instrumentation diagrams.

(2) The dates and descriptions of any changes in the design specifications.

(3) A description of the parameter or parameters monitored, as required in § 61.242-11(e), to ensure that control devices are operated and maintained in conformance with their design and an explanation of why that parameter (or parameters) was selected for the monitoring.

(4) Periods when the closed-vent systems and control devices required in §§ 61.242-2, 61.242-3, 61.242-4, 61.242-5 and 61.242-9 are not operatd as designed, including periods when a flare pilot light does not have a flame.

(5) Dates of startups and shutdowns of the closed-vent systems and control devices required in §§ 61.242-2, 61.242-3, 61.242-4, 61.242-5 and 61.242-9.

(e) The following information pertaining to all equipment subject to the requirements in § 61.242-1 to § 61.242-11 shall be recorded in a log that is kept in a readily accessible location:

(1) A list of identification numbers for equipment subject to the requirements of this subpart.

(2)(i) A list of identification numbers for equipment that the owner or operator elects to designate for no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background, under the provisions of §§ 61.242-2(e), 61.242-3(i), and 61.242-7(f).

(ii) The designation of this equipment as subject to the requirements of § 61.242-2(e), 61.242-3(i), or 61.242-7(f) shall be signed by the owner or operator.

(3) A list of equipment identification numbers for pressure relief devices required to comply with § 61.424-4(a).

(4)(i) The dates of each compliance test required in §§ 61.242-2(e), 61.242-3(i), 61.242-4, and 61.242-7(f).

(ii) The background level measured during each compliance test.

(iii) The maximum instrument reading measured at the equipment during each compliance test.

(5) A list of identification numbers for equipment in vacuum service.

(f) The following information pertaining to all valves subject to the requirements of § 61.242-7(g) and (h) shall be recorded in a log that is kept in a readily accessible location:

(1) A list of identification numbers for valves that are designated as unsafe to monitor, an explanation for each valve stating why the valve is unsafe to monitor, and the plan for monitoring each valve.

(2) A list of identification numbers for valves that are designated as difficult to monitor, an explanation for each valve stating why the valve is difficult to monitor, and the planned schedule for monitoring each valve.

(g) The following information shall be recorded for valves complying with § 61.243-2:

(1) A schedule of monitoring.

(2) The percent of valves found leaking during each monitoring period.

(h) The following information shall be recorded in a log that is kept in a readily accessible location:

(1) Design criterion required in § 61.242-2(d)(5) and § 61.242-3(e)(2) and an explanation of the design criterion; and

(2) Any changes to this criterion and the reasons for the changes.

(i) The following information shall be recorded in a log that is kept in a readily accessible location for use in determining exemptions as provided in the applicability section of this subpart and other specific subparts:

(1) An analysis demonstrating the design capacity of the process unit, and

(2) An analysis demonstrating that equipment is not in VHAP service.

(j) Information and data used to demonstrate that a piece of equipment is not in VHAP service shall be recorded in a log that is kept in a readily accessible location. (Sec. 114 of the Clean Air Act as amended (42 U.S.C. 7414).)

§ 61.247 Reporting requirements.

(a)(1) An owner or operator of any piece of equipment to which this subpart applies shall submit a statement in writing notifying the Administrator that the requirements of §§ 61.242, 61.245, 61.246, and 61.247 are being implemented.

(2) In the case of an existing source or a new source which has an initial startup date preceding the effective date, the statement is to be submitted within 90 days of the effective date, unless a waiver of compliance is granted under § 61.11, along with the information required under § 61.10. If a waiver of compliance is granted, the statement is to be submitted on a date scheduled by the Administrator.

(3) In the case of new sources which did not have an initial startup date preceding the effective date, the statement shall be submitted with the application for approval of construction, as described in § 61.07.

(4) The statement is to contain the following information for each source:

(i) Equipment identification number and process unit identification.

(ii) Type of equipment (for example, a pump or pipeline valve).

(iii) Percent by weight VHAP in the fluid at the equipment.

(iv) Process fluid state at the equipment (gas/vapor or liquid).

(v) Method of complince with the standard (for example, "monthly leak detection and repair" or "equipped with dual mechanical seals").

(b) A report shall be submitted to the Administrator semiannually starting 6 months after the initial report required in § 61.247(a), that includes the following information:

(1) Process unit identification.

(2) For each month during the semiannual reporting period.

(i) Number of valves for which leaks were detected as described in § 61.242-7(b) of § 61.243-2.

(ii) Number of valves for which leaks were not repaired as required in § 61.242-7(d).

(iii) Number of pumps for which leaks were detected as described in § 61.242-2(b) and (d)(6).

(iv) Number of pumps for which leaks were not repaired as required in § 61.242-2(c) and (d)(6).

(v) Number of compressors for which leaks were detected as described in § 61.242-3(f).

(vi) Number of compressors for which leaks were not repaired as required in § 61.242-3(g).

(vii) The facts that explain any delay of repairs and, where appropriate, why a process unit shutdown was technically infeasible.

(3) Dates of process unit shutdowns which occurred within the semiannual reporting period.

(4) Revisions to items reported according to paragraph (a) if changes have occurred since the initial report or subsequent revisions to the initial report.

(5) The results of all performance tests to determine compliance with § 61.242-2(e), § 61.242-3(i), § 61.242-4(a), § 61.242-7(f), § 61.242-11(f), § 61.243-1 and § 61.243-2 conducted within the semiannual reporting period.

(c) In the first report submitted as required in § 61.247(a), the report shall include a reporting schedule stating the months that semiannual reports shall be submittted. Subsequent reports shall be submitted according to that schedule, unless a revised schedule has been submitted in a previous semiannual report.

(d) An owner or operator electing to comply with the provisions of §§ 61.243-1 and 61.243-2 shall notify the Administrator of the alternative standard selected 90 days before implementing either of the provisions.

(e) An application for approval of construction or modification, § 61.05(a) and § 61.07, will not be required if—

(1) The new source complies with the standard, § 61.242;

(2) The new source is not part of the construction of a process unit; and

(3) In the next semiannual report required by § 61.247(b), the information in § 61.247(a)(4) is reported.

(Sec. 114 of the Clean Air Act as amended (42 U.S.C. 7414).) (Approved by the Office of Management and Budget under control number ICR-1153.)

2. By adding paragraphs (a)(4), (5), and (6) to § 61.18 of Subpart A—General Provisions as follows. The

introductory text of the section and of paragraph (a) are shown for reader convenience.

§ 61.18 Incorporation by reference.

The materials listed below are incorporated by reference in the corresponding sections noted. These incorporations by reference were approved by the Director of the Federal Register on the date listed. These materials are incorporated as they exist on the date of the approval, and a notice of any changes in these materials will be published in the Federal Register. The materials are available for purchase at the corresponding address noted below, and all are available for inspection at the Office of the Federal Register Information Center, Room 8401, 1100 L Street, N.W., Washington, D.C. 20408 and the Library (MD-35), U.S. EPA, Research Triangle Park, North Carolina 27711.

(a) The following materials are available for purchase from at least one of the following addresses: American Society for Testing and Materials (ASTM), 1916 Race Street, Philadelphia, Pennsylvania 19103; or the University Microfilms International, 300 North Zeeb Road, Ann Arbor, Michigan 48106.

* * * *

(4) ASTM D 2267-68 (Reapproved 1978), Aromatics in Light Naphthas and Aviation Gasolines by Gas Chromatography, IBR approved June 6, 1984, for § 61.245 (d)(1).

(5) ASTM D 2382-76, Heat of Combustion of Hydrocarbon Fuels by Bomb Calorimeter (High-Precision Method), IBR approved June 6, 1984, for § 61.245 (e)(3).

(6) ASTM D 2504-67 (Reapproved 1977), Noncondensable Gases in C_3 and Lighter Hydrocarbon Products

by Gas Chromatography, IBR approved June 6, 1984, for § 61.245(e)(3).

(Sections 112 and 301(a) of the Clean Air Act, as amended, [42 U.S.C. 7412, 7601(a)]).

APPENDIX G

Excerpt from 40 C.F.R. Part 61

§ 61.05 Prohibited activities.

(a) After the effective date of any standard, no owner or operator shall construct or modify any stationary source subject to that standard without first obtaining written approval from the Administrator in accordance with this subpart, except under an exemption granted by the President under section 112(c)(2) of the Act. Sources, the construction or modification of which commenced after the publication date of the standards proposed to be applicable to the sources, are subject to this prohibition.

(b) After the effective date of any standard, no owner or operator shall operate a new stationary source subject to that standard in violation of the standard, except under an exemption granted by the President under section 112(c)(2) of the Act.

(c) Ninety days after the effective date of any standard, no owner or operator shall operate any existing source subject to that standard in violation of the standard, except under a waiver granted by the Administrator under this part or under an exemption granted by the President under section 112(c)(2) of the Act.

(d) No owner or operator subject to the provisions of this part shall fail to report, revise reports, or report source test results as required under this part.

[38 FR 8826, Apr. 6, 1973, as amended at 50 FR 46291, Nov. 7, 1985]

Excerpts from Subpart FF—National Emission Standard for Benzene Waste Operations

55 Fed. Reg. 8346 (March 7, 1990)

* * * *

§ 61.342 Standards: General.

(a) An owner or operator of a facility at which the total annual benzene quantity from facility waste is less than 10 megagrams per year (Mg/yr) shall be exempt from the requirements of paragraphs (b) and (c) of this section. The total annual benzene quantity from facility waste is the sum of the annual benzene quantity for each waste streams at the facility that has a flow-weighted annual average water content greater than 10 percent. The total annual benzene quantity from facility waste shall be determined in accordance with the procedures specified in § 61.355(a) of this subpart.

* * * *

§ 61.355 Test methods, procedures, and compliance provisions.

(a) An owner or operator shall determine the total annual benzene quantity from facility waste by the following procedure:

(1) For each waste stream subject to this subpart having a flow-weighted annual average water content greater than 10 percent water, the owner or operator shall:

(i) Determine the annual waste quantity for each waste stream at the point of waste generation using the procedures specified in paragraph (b) of this section.

(ii) Determine the flow-weighted annual average benzene concentration for each waste stream at the point of waste generation using the procedures specified in paragraph (c) of this section.

(iii) Calculate the annual benzene quantity for each waste stream by multiplying the annual waste quantity of

the waste stream times the flow-weighted annual average benzene concentration.

(2) Total annual benzene quantity from facility waste is calculated by adding together the annual benzene quantity for each waste stream.

(3) If the total annual benzene quantity from facility waste is equal to or greater than 10 Mg/yr, then the owner or operator shall comply with the requirements of § 61.342 (c) or (d) of this subpart.

(4) If the total annual benzene quantity from facility waste is less than 10 Mg/yr but is equal to or greater than 1 Mg/yr, then the owner or operator shall:

(i) Comply with the recordkeeping requirements of § 61.356 and reporting requirements of § 61.357 of this subpart; and

(ii) Repeat the determination of total annual benzene quantity from facility waste at least once per year whenever there is a change in the process generating the waste that could cause the total annual benzene quantity from facility waste to increase to 10 Mg/yr or more.

(5) If the total annual benzene quantity from facility waste is less than 1 Mg/yr, then the owner or operator shall:

(i) Comply with the recordkeeping requirements of § 61.356 and reporting requirements of § 61.357 of this subpart; and

(ii) Repeat the determination of total annual benzene quantity from facility waste whenever there is a change in the process generating the waste that could cause the total annual benzene quantity from facility waste to increase to 1 Mg/yr or more.

(b) An owner or operator shall determine the annual waste quantity for each waste stream by one of the following methods:

(1) Selecting the highest annual quantity of waste managed from historical records representing the most recent 5 years of operation or, if the facility has been in service for less than 5 years but at least 1 year, from historical records representing the total operating life of the facility;

(2) Using the maximum design capacity of the waste management unit; or

(3) Measurements that are representative of maximum waste generation rates.

(c) An owner or operator shall determine the flow-weighted annual average benzene concentration for each waste stream by one of the following methods:

(1) *Knowledge of the waste.* The owner or operator shall provide sufficient information to document the flow-weighted annual average benezene concentration of each waste stream. Examples of information that could constitute knowledge include material balances, records of chemicals purchases, or previous test results provided the results are still relevant to the current waste stream conditions. If test data are used, then the owner or operator shall provide documentation describing the testing protocol and the means by which sampling variability and analytical variability were accounted for in the determination of the flow-weighted annual average benzene concentration for the waste stream.

(2) Measurements of the benzene concentration in the waste stream in accordance with the following procedures:

(i) Collect a minimum of three representative samples from each waste stream. Where feasible, samples shall be taken from an enclosed pipe prior to the waste being exposed to the atmosphere.

(ii) For waste in enclosed pipes, the following procedures shall be used:

(A) Samples shall be collected prior to the waste being exposed to the atmosphere in order to minimize the loss of benzene prior to sampling.

(B) A static mixer shall be installed in the process line or in a by-pass line unless the owner or operator demonstrates that installation of a static mixer in the line is not necessary to accurately determine the benzene concentration of the waste stream.

(C) The sampling tap shall be located within two pipe diameters of the static mixer outlet.

(D) Prior to the initiation of sampling, sample lines and cooling coil shall be purged with at least four volumes of waste.

(E) After purging, the sample flow shall be directed to a sample container and the tip of the sampling tube shall be kept below the surface of the waste during sampling to minimize contact with the atmosphere.

(F) Samples shall be collected at a flow rate such that the cooling coil is able to maintain a waste temperature less than 10°C.

(G) After filling, the sample container shall be capped immediately (within 5 seconds) to leave a minimum headspace in the container.

(H) The sample containers shall immediately be cooled and maintained at a temperature below 10°C for transfer to the laboratory.

(iii) When sampling from an enclosed pipe is not feasible, a minimum of three representative samples shall be collected in a manner to minimize exposure of the sample to the atmosphere and loss of benzene prior to sampling.

(iv) Each waste sample shall be analyzed using one of the following test methods for determining the benzene concentration in a waste stream:

(A) Method 8020, Aromatic Volatile Organics, in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication No. SW-846 (incorporation by reference as specified in § 61.18 of this part);

(B) Method 8021, Volatile Organic Compounds in Water by Purge and Trap Capillary Column Gas Chromatography with Photoionization and Electrolytic Conductivity Detectors in Series in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods." EPA Publication No. SW-846 (incorporation by reference as specified in § 61.18 of this part);

(C) Method 8240, Gas Chromatography/Mass Spectrometry for Volatile Organics in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication No. SW-846 (incorporation by reference as specified in § 61.18 of this part);

(D) Method 8260, Gas Chromatography/Mass Spectrometry for Volatile Organics: Capillary Column Technique in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication No. SW-846 (incorporation by reference as specified in § 61.18 of this part);

(E) Method 602, Purgeable Aromatics, as described in 40 CFR part 136, appendix A, Test Procedures for Analysis of Organic Pollutants, for wastewaters for which this is an approved EPA methods; or

(F) Method 624, Purgeables, as described in 40 CFR part 136, appendix A, Test Procedures for Analysis of Organic Pollutants, for wastewaters for which this is an approved EPA method.

(v) The flow-weighted annual average benzene concentration shall be calculated by averaging the results of the sample analyses as follows:

$$C = \frac{1}{Q_t} \times \sum_{i=1}^{n} (Q_i)(C_i)$$

Where:

C = Flow-weighted annual average benzene concentration for waste stream, ppmw.

Q_t = Total annual waste quantity for waste stream, kg/yr.

n = Number of waste samples (at least 3).

Q_i = Annual waste quantity for waste stream represented by C_i, kg/yr.

C_i = Measured concentration of benzene in waste sample i, ppmw.

(d) An owner or operator using performance tests to demonstrate compliance of a treatment process with § 61.348(a)(1)(i) of this subpart shall measure the flow-weighted annual average benzene concentration of the waste stream existing the treatment process by collecting and analyzing a minimum of three representative samples of the waste stream using the procedure in paragraph (c)(2) of this section. The test shall be conducted under conditions that exist when the treatment process is operating at the highest inlet waste stream flow rate and benzene content expected to occur. Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a test. The owner or operator shall record all process information as is necessary to document the operating conditions during the test.

(e) An owner or operator using performance tests to demonstrate compliance of a treatment process with § 61.348(a)(1)(ii) of this subpart shall determine the percent reduction of benzene in the waste stream on a mass basis by the following procedure:

(1) The test shall be conducted under conditions that exist when the treatment process is operating at the highest inlet waste stream flow rate and benzene content expected to occur. Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a test. The owner or operator shall record all process information as is necessary to document the operating conditions during the test.

(2) All testing equipment shall be prepared and installed as specified in the appropriate test methods.

(3) The mass flow rate of benzene entering the treatment process (E_b) shall be determined by computing the product of the flow rate of the waste stream entering the treatment process, as determined by the inlet flow meter, and the benzene concentration of the waste stream, as determined using the sampling and analytical procedures specified in paragraph (c) of this section. Three grab samples of the waste shall be taken at equally spaced time intervals over a 1-hour period. Each 1-hour period constitutes a run, and the performance test shall consist of a minimum of 3 runs conducted over a 3-hour period. The mass flow rate of benzene entering the treatment process is calculated as follows:

$$E_b = \frac{K}{n \times 10^6} \left(\sum_{i=1}^{n} V_i C_i \right)$$

Where:

E_b = Mass flow rate of benzene entering the treatment process, kg/hour.

K = Density of the waste stream, kg/m^3.

V_i = Average volume flow rate of waste entering the treatment process during each run i, m^3/hour.

C_i = Average concentration of benzene in the waste stream entering the treatment process during each run i, ppmw.

n = Number of runs.

(4) The mass flow rate of benzene exiting the treatment process (E_a) shall be determined by computing the product of the flow rate of the waste stream exiting the treatment process, as determined by the inlet flow meter, and the benzene concentration of the waste stream, as determined using the sampling and analytical procedures specified in paragraph (c) of this section. Three grab samples of the waste shall be taken at equally spaced time intervals over a 1-hour period. Each 1-hour period constitutes a run, and the performance test shall consist of a minimum of 3 runs conducted over the same 3-hour period at which the mass flow rate of benzene entering the treatment process is determined. The mass flow rate of benzene exiting the treatment process is calculated as follows:

$$E_a = \frac{K}{n \times 10^6} \left(\sum_{i=1}^{n} V_i C_i \right)$$

Where:

E_a = Mass flow rate of benzene exiting the treatment process, kg/hour.

K = Density of the waste stream, kg/m^3.

V_i = Average volume flow rate of waste exiting the treatment process during each run i, m^3/hour.

C_i = Average concentration of benzene in the waste stream exiting the treatment process during each run i, ppmw.

n = Number of runs.

(5) The percent reduction across the treatment process shall be calculated as follows:

$$R = \frac{E_b - E_a}{E_b} \times 100$$

Where:

R = Control efficiency of the treatment process, percent.

E_b = Mass flow rate of benzene entering the treatment process, kg/hour.

E_a = Mass flow rate of benzene exiting the treatment process, kg/hour.

(f) An owner or operator using performance tests to demonstrate compliance of a treatment process with § 61.348(a)(1)(iii) of this subpart shall determine the benzene destruction efficiency for the combustion unit by the following procedure:

(1) The test shall be conducted under conditions that exist when the combustion unit is operating at the highest inlet waste stream flow rate and benzene content expected to occur. Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a test. The owner or operator shall record all process information necessary to document the operating conditions during the test.

(2) All testing equipment shall be prepared and installed as specified in the appropriate test methods.

(3) The mass flow rate of benzene entering the combustion unit shall be determined by computing the product of the flow rate of the waste stream entering the combustion unit, as determined by the inlet flow meter, and the benzene concentration of the waste stream, as determined using the sampling procedures in paragraph (c) of this section. Three grab samples of the waste shall be taken at equally spaced time intervals over a 1-hour period. Each 1-hour period constitutes a run, and the performance test shall consist of a minimum of 3 runs conducted over a

3-hour period. The mass flow rate of benzene into the combustion unit is calculated as follows:

$$E_b = \frac{K}{n \times 10^6} \left(\sum_{i=1}^{n} V_i C_i \right)$$

Where:

E_b = Mass flow rate of benzene into the combustion unit, kg/hour.

K = Density of the waste stream, kg/m^3.

V_i = Average volume flow rate of waste entering the combustion unit during each run i, m^3/hour.

C_i = Average concentration of benzene in the waste stream entering the combustion unit during each run i, ppmw.

n = Number of runs.

(4) The mass flow rate of benzene exiting the combustion unit exhaust stack shall be determined as follows:

(i) The time period for the test shall not be less than 3 hours during which at least 3 stack gas samples are collected and be the same time period at which the mass flow rate of benzene entering the treatment process is determined. Each sample shall be collected over a 1-hour period (e.g., in a tedlar bag) to represent a time-integrated composite sample and each 1-hour period shall correspond to the periods when the waste feed is sampled.

(ii) A run shall consist of a 1-hour period during the test. For each run:

(A) The reading from each measurement shall be recorded;

(B) The volume exhausted shall be determined using method 2, 2A, 2C, or 2D from appendix A of 40 CFR part 60, as appropriate.

(C) The average benzene concentration in the exhaust downstream of the combustion unit shall be determined using method 18 from appendix A of 40 CFR part 60.

(iii) The mass of benzene emitted during each run shall be calculated as follows:

$M_i = KVC(10^{-6})$

Where:

M_i = Mass of benzene emitted during run i, kg.

V = Volume of air-vapor mixture exhausted at standard conditions, m^3.

C = Concentration of benzene measured in the exhaust, ppmv.

K = Conversion factor = 3.24 kg/m^3 for benzene.

(iv) The benzene mass emission rate in the exhaust shall be calculated as follows:

$$E_a = \left(\sum_{i=1}^{n} M_i \right) FT$$

Where:

E_a = Mass flow rate of benzene emitted, kg/hour.

M_i = Mass of benzene emitted during i, kg.

T = Total time of all runs, hour.

n = Number of runs.

(5) The benzene destruction efficiency for the combustion unit shall be calculated as follows:

$$R = \frac{E_b - E_a}{E_b} \times 100$$

Where:

R = Benzene destruction efficiency for the combustion unit, percent.

E_b = Mass flow rate of benzene into the combustion unit, kg/hour.

E_a = Mass flow of benzene from the combustion unit, kg/hour.

(g) An owner or operator using performance tests to demonstrate compliance of a wastewater treatment system unit with § 61.348(b)(1) of this subpart shall measure the flow-weighted annual average benzene concentration of the wastewater stream exiting the unit by collecting and analyzing a minimum of three representative samples of the waste stream using the procedures in paragraph (c)(2) of this section. The test shall be conducted under conditions that exist when the wastewater treatment system is operating at the highest inlet wastewater stream flow rate and benzene content expected to occur. Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a test. The owner or operator shall record all process information as is necessary to document the operating conditions during the test.

(h) An owner or operator shall test equipment for compliance with no detectable emissions as required in §§ 61.343 through 61.347, and § 61.349 of this subpart in accordance with the following requirements:

(1) Monitoring shall comply with method 21 from appendix A of 40 CFR part 60.

(2) The detection instrument shall meet the performance criteria of method 21.

(3) The instrument shall be calibrated before use on each day of its use by the procedures specified in method 21.

(4) Calibration gases shall be:

(i) Zero air (less than 10 ppm of hydrocarbon in air); and

(ii) A mixture of methane or n-hexane and air at a concentration of approximately, but less than, 10,000 ppm methane or n-hexane.

(5) The background level shall be determined as set forth in method 21.

(6) The instrument probe shall be traversed around all potential leak interfaces as close as possible to the interface as described in method 21.

(7) The arithmetic difference between the maximum concentration indicated by the instrument and the background level is compared to 500 ppm for determining compliance.

(i) An owner or operator using a performance test to demonstrate compliance of a control device with the organic reduction efficiency requirement specified under § 61.349(a)(2) of this subpart shall use the following procedures:

(1) The test shall be conducted under conditions that exist when the waste management unit vented to the control device is operating at the highest load or capacity level expected to occur. Operations during periods of startup, shutdown, and malfunction shall not constitute representative conditions for the purpose of a test. The owner or operator shall record all process information necessary to document the operating conditions during the test.

(2) Sampling sites shall be selected using method 1 or 1A from appendix A of 40 CFR part 60, as appropriate.

(3) The mass flow rate of organics entering and exiting the control device shall be determined as follows:

(i) The time period for the test shall not be less than 3 hours during which at least 3 stack gas samples are

collected. Samples of the vent stream entering and exiting the control device shall be collected during the same time period. Each sample shall be collected over a 1-hour period (e.g., in a tedlar bag) to represent a time-integrated composite sample.

(ii) A run shall consist of a 1-hour period during the test. For each run:

(A) The reading from each measurement shall be recorded;

(B) The volume exhausted shall be determined using method 2, 2A, 2C, or 2D from appendix A of 40 CFR part 60, as appropriate;

(C) The organic concentration in the vent stream entering and exiting the control shall be determined using method 18 from appendix A of 40 CFR part 60.

(iii) The mass of organics entering and exiting the control device during each run shall be calculated as follows:

$$M_{aj} = K \quad V_{aj} \left(\sum_{i=1}^{n} C_{aj} MW_i \right) (10^{-6})$$

$$M_{bj} = K \quad V_{bj} \left(\sum_{i=1}^{n} C_{bj} MW_i \right) (10^{-6})$$

Where:

M_{aj} = Mass of organics in the vent stream entering the control device during run j, kg.

M_{bj} = Mass of organics in vent stream exiting the control device during run j, kg.

V_{aj} = Volume of vent stream entering the control device during run j at standards conditions, m^3.

V_{bj} = Volume of vent stream exiting the control device during run j at standards conditions, m^3.

C_{aj} = Organic concentration of compound i measured in the vent stream entering the control device as determined by Method 18, ppm by volume on a dry basis.

C_{bj} = Organic concentration of compound i measured in the vent stream exiting the control device as determined by method 18, ppm by volume on a dry basis.

MW_i = Molecular weight of organic compound i in the vent stream kg/kg-mol.

n = Number of organic compounds in the vent stream.

K = Conversion factor for molar volume = 0.0416 kg-mol/m^3 at 293°K and 760 mm Hg).

10^{-6} = Conversion from ppm, ppm^{-1}.

(iv) The mass flow rate of organics entering and exiting the control device shall be calculated as follows:

$$E_a = \left(\sum_{j=1}^{n} M_{aj} \right) / T$$

$$E_b = \left(\sum_{j=1}^{} M_{bj} \right) / T$$

Where:

E_a = Mass flow rate of organics entering the control device, kg/hour.

E_b = Mass flow rate of organics exiting the control device, kg/hour.

M_{aj} = Mass of organics in the vent stream entering the control device during run j, kg.

M_{bj} = Mass of organics in vent stream exiting the control device during run j, kg.

T = Total time of all runs, hour.

n = Number of runs.

(4) The organic reduction efficiency for the control device shall be calculated as follows:

$$R = \frac{E_b - E_a}{E_b} \times 100$$

Where:

R = Total organic reduction efficiency for the control device, percent.

E_b = Mass flow rate of organics entering the control device, kg/hr.

E_a = Mass flow rate of organics exiting the control device, kg/hr.

Excerpts from 40 CFR Part 61, Subpart FF
58 Fed. Reg. 3095 (January 7, 1993)

§ 61.342 Standards: General.

(a) An owner or operator of a facility at which the total annual benzene quantity from facility waste is less than 10 megagrams per year (Mg/yr) shall be exempt from the requirements of paragraphs (b) and (c) of this section. The total annual benzene quantity from facility waste is the sum of the annual benzene quantity for each waste stream at the facility that has a flow-weighted annual average water content greater than 10 percent or that is mixed with water, or other wastes, at any time and the mixture has an annual average water content greater than 10 percent. The benzene quantity in a waste stream is to be counted only once without multiple counting if other waste streams are mixed with or generated from the original waste stream. Other specific requirements for calculating the total annual benzene waste quantity are as follows:

(1) Wastes that are exempted from control under §§ 61.342(c)(2) and 61.342(c)(3) are included in the calculation of the total annual benzene quantity if they have an annual average water content greater than 10 percent, or if they are mixed with water or other wastes at any time and the mixture has an annual average water content greater than 10 percent.

(2) The benzene in a material subject to this subpart that is sold is included in the calculation of the total annual benzene quantity if the material has an annual average water content greater than 10 percent.

(3) Benzene in wastes generated by remediation activities conducted at the facility, such as the excavation of contaminated soil, pumping and treatment of groundwater, and the recovery of product from soil or groundwater, are not included in the calculation of total annual benzene quantity for that facility. If the facility's total annual ben-

zene quantity is 10 Mg/yr or more, wastes generated by remediation activities are subject to the requirements of paragraphs (c) through (h) of this section. If the facility is managing remediation waste generated offsite, the benzene in this waste shall be included in the calculation of total annual benzene quantity in facility waste, if the waste streams have an annual average water content greater than 10 percent, or if they are mixed with water or other wastes at any time and the mixture has an annual average water content greater than 10 percent.

(4) The total annual benzene quantity is determined based upon the quantity of benzene in the waste before any waste treatment occurs to remove the benzene except as specified in § 61.355(c)(1)(i) (A) through (C).

APPENDIX H

INITIAL REPORT OF E. BRUCE NAUMAN

The 1984 benzene NESHAPs promulgated by the Environmental Protection Agency ("EPA") on June 6, 1984, exempts from coverage plant sites that "produce or use less than 1,000 megagrams of benzene per year." The preamble to the final benzene NESHAPs and supporting documents in the rulemaking record clearly treat the terms "use" and "consumption" as interchangeable in explaining the meaning of the exemption. Therefore, based on a review of the language of the benzene NESHAPs, the preamble to the final benzene NESHAPs, and other material in the rulemaking docket, the Hoechst Celanese Corporation (HCC) and responsible state agencies (for example, the Texas Air Control Board) correctly concluded that EPA intended to exempt from the NESHAPs any plants that "used' less than 1,000 megagrams of benzene based on a single counting of benzene at the site.

Nonetheless, I am informed that the EPA staff has attempted to redefine the word "use" to dramatically narrow the scope of the exemption. EPA staff has done this by attempting to require a multiple counting of the same gram of benzene as it is recirculated in internal process loops at a plant site where benzene is present. The fallacy of this approach is evident when one applies it either to the term "produce" or the term "use," as those terms appear in the exemption provision. Let me explain why this is so both in the case of facilities that "produce" benzene and in the case of facilities that "use" benzene.

1. Plain Meaning of the Exemption

A plant site designed to produce less than 1,000 megagrams of benzene per year will start with a raw material and generate from it an annual quantity of benzene, potentially available for sale, that is less than 1,000 megagrams. The word "produce" is unambiguous in this context. All significant producers of benzene were identified and con-

sidered in the rulemaking process. Each benzene-producing facility includes distillation as a key step. Distillation, by its very nature, creates recycle streams within the process unit. These streams are (1) internal to the distillation column, (2) between the column and the reboiler, and (3) between the column and the condenser. If one were to calculate the amounts of benzene recirculated through each of these streams and add them together, the sum would be many times greater than the amount of benzene actually produced by the benzene production unit (the "throughput"). Internal recycle streams are never counted in determining production and therefore are not included in the calculation of throughput.

In short, in calculating how much benzene is produced by a plant site, it is plainly erroneous to include a multiple counting of the benzene that is recirculated in internal recycle streams. Such a multiple counting would result in "production rates" grossly in excess of the amount actually produced and potentially available for sale.

The same principle applies to process units that use or "consume" benzene as an agent in the production of another product. Typically, such units also have internal recycle streams, but the amount of benzene used is the amount that must be purchased each year, not the amount, many times greater, that has recirculated internally.

An automobile's cooling system is a simple example of a process unit analogous to a facility that recycles benzene internally. The coolant or antifreeze is recycled through the system when the automobile operates. At the end of a year, the automobile may require the addition of some antifreeze to maintain a full cooling system. The cooling system would be considered to have "used" antifreeze during the year equivalent to the amount purchased and added to the system. Under generally accepted chemical engineering principles, the molecules of antifreeze would not be recounted multiple times as they are recycled in the cooling system in order to calculate a "use" number. Otherwise, the cooling system would be considered to have

"used" tens of thousands of gallons of antifreeze over the course of the year. These principles of chemical engineering apply equally to the calculation of benzene used in a facility that recycles benzene internally.

2. The Background Information Document

That the EPA staff's post-promulgation reinterpretation of the exemption to suggest "use" involves a calculation based on multiple counting of the same molecules of benzene over and over again has no basis in science, chemical engineering or common sense is confirmed by a review of the background information document ("BID") for the benzene NESHAPs. The BID explains that benzene "use" is to be determined through a "mass balance." The generally accepted meaning of mass balance within the chemical engineering profession is a calculation designed to account for the amounts of all material entering and leaving a particular process (subject to inventory changes). In light of the well known "conservation of matter" principle (matter can neither be created nor destroyed), the amount of material entering a process must not exceed the amount leaving. Mass balances are therefore commonly used in chemical facilities to determine the amount of fugitive emissions of chemicals used in the process. Often this is accomplished by inferring the amount of a particular chemical emitted to the air by measuring the amounts of that chemical in other known sources of losses, e.g., wastewater streams, pollution control devices, incorporation into the product, and subtracting that figure from the amount entering the process. The difference is the amount of the chemical emitted to the air. In performing this calculation, plant chemical or process engineers place a theoretical "black box" or "control volume" around the plant or piece of equipment for which a mass balance is to be measured. Recycle streams internal to the control volume are never considered in mass balance calculations. Indeed, the imagery associated with the term "black box" reflects the fact that one need

not know what is inside the "black box" control volume to make the calculation.

The BID further states that the "mass balance" is used to calculate the "throughput of benzene, accumulating all benzene processed in a year. The "throughput" for the plant site or for a process unit is equal to the mass balance performed on that control volume—effectively the amount the site or unit consumes. It does not consider or count internal processes or internal processing rates, since they are unrelated to and independent of the "throughput" calculation for the plant site or process unit.

EPA staff has tried to equate "processing rate" with "throughput." Although this may be appropriate in some cases, it is not appropriate in the context of this exemption. "Processing rate" is the instantaneous flow rate of material through some piece of equipment, such as a flange in a recycle stream of a distillation column. "Throughput," in the context of the exemption, is the net flow through the process unit as a whole. (By "process unit," I mean the unit that produces the final product for which the unit has been designed to produce. For example, the acid recovery or anhydride manufacturing units at the Celriver and Celco plants are process units.)

3. The PES Memo

In 1983, PES, Inc., EPA's consultant in developing and preparing the benzene NESHAPs, wrote a memorandum (the "PES Memo") to explain the basis of the 1,000 megagram exemption in the benzene NESHAPs. The PES Memo uses the "nameplate" capacities of production process units to correlate fugitive emissions with poduction rates for the purpose of evaluating effect of establishing an exemption level at various facilities with nameplace capacities between 100 and 1,000 megagrams per year. The nameplate capacity, or design capacity, is the amount of benzene that the plant can produce and make available for sale in any one year. It does not include a considera-

tion of how many times benzene may be recycled or circulated through various loops during the course of its production. In other words, nameplate capacity is not a multiple-count number. Thus, the PES Memo confirms that the measurement of design capacity does not involve multiple counting of benzene in facilities that recycle benzene in the process of producing it.

4. The SOCMI VOC NSPS

The PES Memo was based upon and tracked almost verbatim a memorandum previously prepared by Radian Corporation, another consultant employed by EPA in a parallel EPA rulemaking to establish new source performance standards for the synthetic organic chemical manufacturing industry ("SOCMI"), the so-called SOCMI Volatile Organic Compound New Source Performance Standards ("SOCMI VOC NSPS"). The memorandum explaining the basis for an almost identical exemption in the SOCMI rulemaking makes it clear that the drafters of the SOCMI regulation were not considering internal recycling in constructing the exemption. Like its successor, the PES Memo, the Radian memorandum (1) uses three fictional production models; (2) calculates emissions using SOCMI principles (each category of equipment in a chemical facility, pump, flange, valve, etc., regardless of size is assumed to have a specific leak/emission rate); and (3) does not consider the effect of recycling or engage in multiple counting of recirculated chemicals. In fact, the assertion that the cumulative volume of an internally recycled chemical would serve as a valid measure for emission calculations runs directly counter to the SOCMI principles. Additionally, the Radian memorandum, like the PES Memo, after going through its various calculations, makes it clear that the exemption was not based on the amount of emissions or pieces of equipment, but instead is based on the amount of the chemical that is used up or consumed annually. This makes the exemption

provision "easily understood" and "easy to apply" since a plant need only look to its records of purchases to determine whether it qualifies for the exemption. Thus, contrary to the EPA staff's contentions, the number of pieces of equipment in benzene service at a plant site is irrelevant to the application of the exemption.

Additionally, the BID for the SOCMI VOC NSPS, which was prepared by the same EPA staff that prepared the benzene NESHAPs, specifically rejected the concept of "processing rate"—the underpinning of the multiple-counting approach now relied upon by EPA staff—as a basis for determining applicability of the parallel SOCMI VOC NSPS exemption. In connection with that exemption provision, the EPA staff determined that "production rate" was the appropriate measure. ("Production rate" refers to the volume or weight of the output of the unit rather than the cumulative volume or weight of materials recirculated internally based on a multiple counting of those materials in each process stream.)

5. Ease of Application

In contrast to basing the exemption on consumption or purchase data, the EPA staff's current interpretation of the exemption provision is not only not "easily understood," it is also quite difficult to apply. Such application requires a process flow diagram at a minimum; often, though, more information is needed than appears on many standard diagrams.

The difficulty that one would have in applying EPA staff's multiple counting definition of "use" is apparent from the fact that EPA staff has yet to set out exactly how its multiple-count approach is to be applied at various types of plants at various sites. This has resulted in situations where different regulators, looking at the same facility, have been unable to agree on how to calculate the amount of benzene use based on a multiple-count approach.

The absence of a uniform approach has led to situations in which EPA regional offices have failed to apply the multiple-count approach currently espoused by EPA staff. This is apparently what happened at a Department of Defense facility—the Savannah River facility—where EPA was asked to determine if the facility would be covered by or exempt from the benzene NESHAPs. That facility recycled benzene as shown in the documents furnished to EPA. If there had been a multiple counting of benzene at the facility, then the facility would have been found to have exceeded the exemption amount. Apparently unmindful of the multiple-count approach, the EPA staff involved in the Savannah River exemption determination did not attempt to perform a multiple-count calculation nor request information necessary for such a calculation to be made until 1994. Thus, EPA initially concluded that the Savannah River facility was exempt from the benzene NESHAPs even though it had recycle streams that exceeded 1,000 megagrams per year under the multiple-count approach.

6. Anomalies Created by Application of a Multiple-Count Approach

EPA staff's new interpretation of the benzene NESHAPs would virtually eliminate the exemption for even the simplest and smallest of users of benzene who recycle benzene in their operations while exempting large users of benzene who do not recycle. Specifically, a facility that recycles less than a drum of benzene (34 gallons) in a simple, once-a-day recycling operation would exceed the exemption limit, whereas a facility that was designed to use, but did not recycle, 999 megagrams of benzene annually (approximately 297,000 gallons) would be exempt. Since this result would seemingly be contrary to the ultimate purpose of the benzene NESHAPs—the reduction of benzene fugitive air emissions—it would not be reasonable for a chemical engineer or someone else

making a good faith interpretation of the exemption provision to conclude that the cumulative amount of recycled benzene was to be considered in applying the exemption. This was clearly not the intent expressed in the preamble, the BID or the supporting materials in the rulemaking docket.

7. Additional Issues

Finally, it should be noted that the EPA engineers primarily responsible for the exemption language and its reinterpretation, by their own admission, are not chemical engineers and lack expertise in the chemical industry. To those familiar with the industry, the exemption language appeared plain, simple, and easy to apply. As currently interpreted by the EPA staff, the exemption is neither easily understood nor easy to apply.

8. Conclusion

Therefore, as a professor of chemical engineering, I am of the opinion that the exemption provision cannot reasonably be understood to require facilities that recycle benzene to engage in a multiple counting of the amount of internally recycled benzene as it circulates over and over again through each process stream of a process unit. Rather, the only logical interpretation of the exemption provision is that it requires facilities, regardless of whether they recycle benzene, to determine whether their annual "use" of benzene, as measured by consumption of benzene, is less than 1,000 megagrams.

[Copy of resume and other information described in Rule 26 of the Federal Rules of Civil Procedure are omitted in printing.]

AFFIDAVIT OF E. BRUCE NAUMAN

I, E. Bruce Nauman, Phd., hereby depose and state as follows:

1. The March 29, 1982, Radian Memorandum by John H.E. Stelling, III, was prepared for EPA to explain and justify the exemption to the SOCMI NSPS. It also was the basis for the May 20, 1983, David Cole PES Memorandum discussing the basis for the exemption to the benzene NESHAPs. After considering number of pieces of equipment and quantity of emissions as extrapolated therefrom, Radian chose instead to base the exemption cutoff on the amount of SOCMI chemicals "produced" by a facility, as reflected by the facility's "nameplate capacity."[1] "Nameplate capacity" is a commonly understood engineering term meaning the maximum amount of product a plant can make available for sale in any one year. Although chemical production facilities almost always involve internal recycle of the chemicals they produce, "nameplate capacity" is indisputably a single count concept. It is not inflated by the number of times the product may be recycled through various internal loops during the course of production.

2. The analogous PES Memorandum for the NESHAPs, also considered—*and explicitly rejected*—the idea of basing a cutoff on either the number of pieces of equipment at a plant site or the quantity of fugitive emissions at the site because any such cutoff would be difficult to apply. Instead, the PES Memorandum—

---

[1] The technological foundation used for supporting and justifying both exemptions is the SOCMI principle for calculating fugitive emission. That principle expressly provides that fugitive emissions are not affected by processing rate or throughput, but, as is discussed in the Radian and PES Memoranda, are determined by applying average emission factors developed from generic types of pieces of equipment to the number of those types of pieces of equipment at a facility.

like the Radian Memorandum—finally concluded that the exemption should be based on "*design production capacity . . . because it is easily understood and can be applied readily to each location.*" The only type of capacity studied and ultimately recommended for the exemption, was each facility's "nameplate capacit[y]," which—as noted above—is a single count concept that is not affected by the volume or rate of internal benzene recycle.

3. Equally telling, despite the fact that Radian and PES were evaluating facilities which, by their nature, used recycle in their processes, is that there was no effort to calculate any multiple counting of the chemicals produced or used at such facilities. Nor did Radian or PES use any multiple counting figures to calculate the cost-effectiveness of any cutoff. Instead, both Radian and PES recommended establishing exemptions based on a single count concept: nameplate capacity. Specifically, based on a review of the few data points provided by the three studied SOCMI production facilities, Radian and PES plotted lines purporting to make correlations between cost-effectiveness and (1) the nameplate capacity of plants producing SOCMI chemicals, (2) emissions from such facilities, and (3) the number of pieces of equipment at the facilities.[2] Name-

---

[2] It is of course, unsound to assume that a few data points for a few facilities can be used to predict emissions for other chemical facilities. EPA recognizes this by saying that some of the facilities that it wanted to exempt would have too many pieces of equipment. Further, since the analysis as reflected in both the Radian and PES Memoranda was, on its face, nothing more than a very rough attempt to justify a cost-effectiveness balance, it is not surprising that such simplistic analysis cannot be used to indicate accurately either a facility's emissions or how many pieces of equipment it might have. It would thus be meaningless to cite these data as justification for doing now what EPA refused to do in 1984, *i.e.*, claim that the exemption is based on the number of pieces of equipment or the amount of emissions at a plant site.

plate capacity was chosen as the basis for the exemption based on ease of use.

4. Much of the text of the PES Memorandum is repeated virtually verbatim in section 2.8.1 of the BID. In particular, the BID repeats the fact that the Agency considered and rejected basing the exemption on the number of pieces of equipment at a plant site because such a cutoff "could not be applied readily to small or intermittent users of benzene, such as pharmaceutical manufacturers and research and development facilities." Paralleling the PES Memorandum's language selecting an exemption cutoff based on the *"design production capacity"* as represented by a facility's "nameplate capacity," the BID repeats the "design production capacity is easy to apply" sentence from the PES Memorandum, but substitutes the phrase "design usage" for "design production capacity." The Agency—in the BID—thus clearly equates "usage" and "production capacit[ies]." And production capacity—like nameplate capacity—is clearly a single count concept.

5. Consistent with the above-described information indicating that the drafters of the BID were focusing on the amount of benzene produced or consumed by processes, which incidently recycled benzene, the BID also discusses in detail the Agency's calculations of the ambient impacts of a lengthy list of benzene-producing and benzene-using sources. It does so based on a *single counting* of the amount of benzene produced or consumed at such sources. EPA does not, in such modeling, do any multiple counting of benzene being processed by facilities which recycle benzene. Indeed, none of the capacity data studied by EPA in either developing the NESHAPs exemption or showing the alleged toxicological impacts of benzene fugitive emission dispersion, involved quantities inflated by some form of multiple counting of internal reycle. This is despite the fact that virtually all producers and most

benzene-using facilities, by their very nature, have internal recycle.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 23, 1995

/s/ E. Bruce Nauman
E. BRUCE NAUMAN, PHD.

State of New York)
County of Albany)

Subscribed and sworn to before me this 2nd day of September, 1995.

/s/ Devinder Singh Uppal
Notary Public

DEVINDER SINGH UPPAL
Notary Public, State of New York
No. 5001587
Qualified in Albany County
Commission Expires September 14, 1996

APPENDIX I

PRINCETON UNIVERSITY

School of Engineering and Applied Science
The Engineering Quadrangle
Princeton, New Jersey 08544-5263
Telephone: (609) 258-2260
Facsimile: (609) 258-6744

[Logo]

James Wei, *Dean*
Professor of Chemical Engineering
Pomeroy and Betty Perry Smith Professor

August 11, 1995

David F. Geneson, Esq.
Claudia T. Farr, Esq.
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 223219-4074

United States v. Hoechst Celanese Corporation
Civil Action No. 0 92 1879 17

United States v. Hoechst Celanese Corporation
Civil Action No. 0 93 0864-R

Dear Claudia and David:

Enclosed is my initial report for the above cases.

Yours sincerely,

/s/ James Wei
JAMES WEI
Professor of Chemical Engineering
Dean of Engineering

JW/kem

REPORT OF JAMES WEI

I have studied relevant documents pertaining to the NESHAP for benzene equipment leaks (National Emission Standards for Hazardous Air Pollutants: Benzene Equipment Leaks (Fugitive Emission Sources), 40 CFR Part 61, Subparts J and V) and to Hoechst Celanese Corporation's Celriver Plant in Rock Hill, South Carolina. This report states my opinion as an expert in chemical engineering.

Let me repeat here the language of three key documents in this case:

(a) 40 CFR 61.110(c)(2) (1,000 megagram exemption to the benzene NESHAP):

> "Any equipment in benzene service that is located at a *plant site designed to produce or use less than 1,000 megagrams of benzene per year is exempt from the requirements of § 61.112.*" (Emphasis added.)

(b) NESHAP Benzene Fugitive Emissions—Background Information for Promulgated Standards, pp. 2-104 and 2-105 (June, 1982) (the Background Information Document, or "BID"):

> *"A cutoff based on benzene design usage is reasonable because it is easily understood and can be applied readily to a plant site . . . .* because the design capacity of a plant using or producing benzene can be applied easily, it was chosen as the basis for the cutoff. . . EPA selected a minimum cutoff of 1,000 Mg/year per plant site based on a benzene design usage rate or throughput. *Throughput is determined by a mass balance during the design stages of process operations, accumulating all benzene processed in 1 year.*" (Emphasis added.)

(c) June 13, 1989 letter to Hoechst Celanese Corporation's Celriver Plant from Winston Smith of EPA:

> "throughput . . . is intended to mean the total cumulative flow through the process rather than net benzene consumption or usage."

There is no ambiguity in the words "*plant site designed to produce*" (see (a) above), which mean the rate of shipment to market through plant gates. No expert in chemical engineering would differ from this interpretation.

"[*P*]*lant site designed to . . . use*" (see (a) above) similarly means the rate of shipment from market through plant gates.

"Mass balance" is the systematic analysis based on the principle "input minus output equals accumulation." A modern chemical plant normally has numerous pieces of equipment and recycle loops, and a mass balance can be taken around each piece of equipment or group of equipment, as well as around the overall plant. There is no known precedence in the chemical engineering textbooks where "designed to use" is taken to mean a circulation rate in one or another recycle loop. Only the overall mass balance of a plant is unique and unambiguous, easily understood and readily applied. For a plant with a number of equipment equal to N, the number of possible mass balances is equal to $N*(N+1)$, so that under this doctrine different chemical engineers may choose different mass balances and confuse each other.

The term "throughout" is ordinarily taken to mean overall net production or consumption, not internal circulation rate. The interpretation that "throughput is intended to mean total cumulative flow through equipment in benzene service rather than net consumption or usage," found in EPA's June 13, 1989 letter to the Celriver Plant, demonstrates a surprising ignorance of commonly accepted concepts and practices in chemical engineering. As a past

President of the American Institute of Chemical Engineers, I am concerned that professionally competent members could pronounce such a radical interpretation without citing authorities and textbooks.

I understand that Fred Dimmick was the lead EPA engineer charged with drafting the benzene NESHAP, and that his post-promulgation interpretation of the 1,000 megagram exemption forms the basis of EPA staff's current position. I understand further that David Cole, an employee of an EPA contractor, assisted EPA staff, including Mr. Dimmick, with drafting the benzene NESHAP and its 1,000 megagram exemption. In my search through the records of the membership of the American Institute of Chemical Engineers, I was relieved to find that the presumed experts Fred Dimmick and David Cole are not listed as members. However, as a former advisor to the EPA, I am not gratified with the trust and reliance on less than carefully researched professional advice in this case, and the neglect to consult with the Science Advisory Board.

The following analogy illustrates the fallacy of the EPA staff's current interpretation of "use": A person with a headache may use 2 aspirin tablets per 8 hours for a total of 6 aspirin tablets per day. At a given moment of time, the 2 aspirin tablets are dissolved in 5 liters of blood, which is pumped by the heart at the rate of 5 liters/minute for a person at rest, and circulates in the body 60 times per hour, and at up to six times that rate under heavy exercise. There are many loops and different rates of circulation for various organs and tissues, being higher through the coronary in the heart and in the brain, and much lower through fat deposits. The person is using 6 tablets of aspirin per day, and not $2 \times 60 \times 24 = 2{,}880$ tablets per day—which would be lethal! The accepted usage in chemical engineering here happily agrees with common sense.

In summary, interpreting "plant site designed to use" as the circulation rate in one or another recycle loop is unprecedented, arbitrary, confusing, not easily understood or readily applied, uninformed, and inappropriate. It is also inconsistent with the uncontested interpretation that "plant site designed to produce" means the net producing rate or shipment to market through the plant gates. Indeed, the post-promulgation interpretations by EPA staff of the term "plant site designed to use" represents the fashioning of a "scientific" justification, however insupportable by accepted scientific theory or practice, to buttress a desired conclusion.

[Copy of resume and other information described in Rule 26 of the Federal Rules of Civil Procedure are omitted in printing.]

Supreme Court, U.S.
FILED
MAY 26 1998
CLERK

(3)

No. 97-1578

In the Supreme Court of the United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
JOHN A. BRYSON
DAVID C. SHILTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTIONS PRESENTED

Pursuant to Section 112 of the Clean Air Act, 42 U.S.C. 7412, the Environmental Protection Agency (EPA) promulgated requirements for preventing leaks of benzene from equipment, but exempted equipment at plants "designed to produce or use less than 1,000 megagrams of benzene per year." 40 C.F.R. 61.110(c)(2). Under EPA's interpretation of "use," which includes all benzene employed in a process including recycled benzene, petitioner's Celriver Plant is not entitled to the exemption. The court of appeals held that EPA could seek civil penalties from petitioner for its noncompliance with the regulatory requirements for the period after petitioner received direct notice of EPA's regulatory interpretation, and remanded for a determination of possible penalties. The questions presented are:

1. Whether the court of appeals properly upheld EPA's interpretation of "use."

2. Whether the court of appeals properly held that petitioner was not entitled to a two-year waiver of the requirements after the company received notice of EPA's regulatory interpretation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Arkansas v. *Oklahoma*, 503 U.S. 91 (1992)	11
Auer v. *Robbins*, 117 S. Ct. 905 (1997)	11
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)	10
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991)	11
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994)	10

Statutes and regulations:

Clean Air Act, Pub. L. No. 84-159, 69 Stat. 322, 42 U.S.C. 7401 *et seq.*:	
§ 112(d)(2), 42 U.S.C. 7412(d)(2)	7
§ 113(b), 42 U.S.C. 7413(b)	2
§ 301(a), 42 U.S.C. 7601(a)	9-10
Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1684-1685:	
§ 111(b)(1)(A), 42 U.S.C. 7411(b)(1)(A) (1988)	2
§ 112(b)(1), 42 U.S.C. 7412(b)(1) (1988)	2
§ 112(b)(1)(B)-(C), 42 U.S.C. 7412(b)(1)(B)-(C) (1988)	2
§ 112(c)(1)(B)(ii), 42 U.S.C. 7412(c)(1)(B)(ii) (1988)	12

Statutes and regulations—Continued: Page

Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 112(e), 91 Stat. 703, 42 U.S.C. 7412(e) (1988) 2

Health Services Research, Health Statistics, and Health Care Technology Act of 1978, Pub. L. No. 95-623, § 112(e)(5), 92 Stat. 3458, 42 U.S.C. 7412(e)(5) (1988) 2

40 C.F.R. 919:

Subpt. A (Sections 61.01-61.19):

Section 61.10(a) 3

Section 61.11 12

Subpt. J (Sections 61.110-61.112):

Section 61.110(a) 2

Section 61.110(c)(1) 3

Section 61.110(c)(2) 2, 9

Section 61.112 3

Section 61.112(a) 2

Subpt. V (Sections 61.240-61.247) 2, 3

Miscellaneous:

42 Fed. Reg. 29,332-29,333 (1977) 2

49 Fed. Reg. (1984):

p. 23,479 2

p. 23,510 ..... 3, 9

Black's Law Dictionary (6th ed. 1990) 7

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1578

HOECHST CELANESE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 128 F.3d 216. The opinion of the district court (Pet. App. 34a-72a) is reported at 964 F. Supp. 967.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1997. A petition for rehearing was denied on December 23, 1997 (Pet. App. 74a-75a). The petition for a writ of certiorari was filed on March 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (Act) authorizes the Environmental Protection Agency (EPA) to identify hazardous air pollutants and their sources, and to prom-

ulgate emission controls for those sources.[1] Prior to 1990, Section 112(b)(1)(B) and (C) of the Act (42 U.S.C. 7412(b)(1)(B) & (C) (1988)) instructed EPA to set National Emission Standards for Hazardous Air Pollutants (NESHAPs) "at the level which in [the Administrator's] judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant," and specified that such standards "shall become effective upon promulgation." Pet. App. 78a.

EPA listed benzene as a hazardous air pollutant in 1977, based on evidence that benzene is a human carcinogen. 42 Fed. Reg. 29,332-29,333. EPA promulgated the final NESHAP for benzene equipment leaks on June 6, 1984. 49 Fed. Reg. 23,479 (Pet. App. 85a). The Benzene Leaks NESHAP applies to specified equipment, such as pumps, valves, and flanges (40 C.F.R. 61.110(a)), and requires regular monitoring and maintenance of leaking equipment, installation of equipment designed to reduce emissions, record keeping and reporting (40 C.F.R. 61.112(a), 61.240-61.247 (Subpt. V)). Violators of the regulations are subject to civil penalties pursuant to Section 113(b) of the Act (42 U.S.C. 7413(b)).

The dispute in this case concerns 40 C.F.R. 61.110(c)(2), which provides that "equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of ben-

---

[1] Clean Air Amendments of 1970, Pub. L. No. 91-604, §§ 111(b)(1)(A), 112(b)(1), 84 Stat. 1684-1685; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 112(e), 91 Stat. 703; Health Services Research, Health Statistics, and Health Care Technology Act of 1978, Pub. L. No. 95-623, § 112(e)(5), 92 Stat. 3458 (currently codified at 42 U.S.C. 7411-7412). Section 112 before the 1990 amendments is reproduced at Pet. App. 77a.

zene per year is exempt from the requirements of § 61.112." Pet. App. 124a.[2] Thus, an exempted plant does not have to follow the equipment and monitoring requirements imposed by Section 61.112 and Subpart V, though other requirements, such as reporting, remain applicable. 40 C.F.R. 61.10(a), 61.110(c)(1). EPA explained this exemption in a section of the preamble to the final rule entitled "[i]mpacts on small plants." 49 Fed. Reg. 23,510 (1984); Pet. App. 112a. The exemption reflected EPA's conclusion that the benefits achievable by regulating small volume users such as "research facilities, pilot plants, and intermittent users of benzene" did not justify the costs of compliance. *Id.* at 113a. The preamble referenced a "Background Information Document" which found that a plant with a design production capacity of about 1000 megagrams per year would typically contain around 87 pieces of equipment in benzene service and would be expected to emit only about six megagrams of benzene per year. *Id.* at 8a-9a. Applying the proposed regulations to such a small plant would result in a reduction of only four megagrams per year, which was not considered cost effective. *Id.* at 9a. The rule became effective June 6, 1984. *Id.* at 85a.

2. This case concerns the Celriver plant owned by petitioner Hoechst Celanese Corporation in Rock Hill, South Carolina. During the period at issue, Celriver used benzene to cool hot ketene gases and to help separate water and other compounds from acetic anhydride and acetic acid; after each use, the benzene was cooled, purified and reused in these processes. Pet. App. 4a-5a. Because petitioner never applied for an exemption for Celriver or filed reports as to its

---

[2] A megagram equals about 2200 pounds. Pet. App. 4a n.1.

benzene usage, EPA did not become aware until 1989 that this plant was not complying with the benzene leak regulations and was emitting substantial amounts of fugitive benzene. *Id.* at 5a. While Celriver had nearly 17,000 individual sources of benzene leaks and was one of the largest sources of fugitive benzene emissions in the nation at that time (*id.* at 9a), petitioner claimed that it believed the plant was exempt because it "consum[ed]" less than 1,000 megagrams of benzene yearly. *Id.* at 5a.

EPA issued a notice of violation for Celriver on February 20, 1990. In April 1990, petitioner submitted a plan to bring Celriver into compliance with the regulations (Pet. App. 21a), and eventually achieved compliance in August 1992. *Id.* at 26a.

3. The United States brought this action in July 1992, seeking civil penalties against petitioner for the period between 1984 and 1992 when Celriver was not in compliance with the regulations. The parties filed motions for summary judgment on the issue of liability. The district court sustained EPA's interpretation that "use" for purposes of the exemption provision included the total amount of benzene utilized or employed in a process, including recycled benzene. Pet. App. 38a-52a. However, the district court found that EPA did not provide petitioner with fair notice of this interpretation, even after EPA's Region 4, which has jurisdiction over Celriver, informed petitioner by letter dated June 13, 1989, that when benzene is recycled, "'use' for purposes of the exemption must be calculated on the basis 'of total cumulative flow through the process rather than net benzene consumption or usage.'" *Id.* at 20a. Region 4 reiterated this position in August 1989, in a letter that set out an example of how petitioner should calculate the amount of benzene

"use[d]" for purposes of the exemption (*id.* at 21a), and in September 1989 petitioner carried out the requested calculation and determined that its annual use of benzene far exceeded the threshold for the exemption. *Ibid.* The district court nevertheless concluded that petitioner still did not receive fair notice because petitioner allegedly had a "legitimate basis for believing" that the letters from Region 4 did not "speak[] for the Administrator" of EPA. *Id.* at 68a. The district court also concluded that petitioner should not be liable for penalties because EPA did not object to a compliance plan submitted by petitioner in 1990 and because petitioner purportedly would have been entitled to a two-year waiver if it had applied for such a waiver. *Id.* at 69a-70a.

On cross-appeals, the court of appeals first upheld the district court's ruling that EPA's interpretation of the exemption provision was entitled to deference. The court found that EPA's interpretation is in accord with the ordinary meaning of the word "use," and consistent with both the overall purposes of the statute and the stated purpose of the provision to exempt only small plants from the leak detection and repair requirements. Pet App. 7a-10a. The court of appeals upheld the district court's ruling that petitioner did not have fair notice of EPA's interpretation for the period before the 1989 letters to petitioner from Region 4. Critical in this regard was the fact that the Texas Air Control Board, which had been delegated authority to administer the NESHAP program in that State, applied the exemption provision to petitioner's plants in Texas in a manner that could have led petitioner to believe that petitioner's interpretation was accurate. *Id.* at 16a-18a.

The court of appeals reversed the district court's holding that the 1989 letters from Region 4 regarding Celriver did not provide adequate notice of how EPA interpreted the exemption. The majority found that Region 4's letters provided petitioner with direct notice of EPA's interpretation, and cited minutes of a meeting of senior Celriver officials showing that they understood EPA's interpretation. Pet. App. 20a-21a. The majority found that the regulations required compliance within 90 days, unless EPA issued a discretionary waiver, and rejected petitioner's argument that it should presume that a waiver would have been granted if it had been sought. *Id.* at 26a. The court ruled that petitioner's efforts in achieving compliance, while not relevant to liability, could be considered in determining "if, and in what amount, penalties should be imposed for the post-August 1989 violations of [petitioner's] Celriver plant." *Id.* at 25a, 27a.[3] Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on December 23, 1997. *Id.* at 74a-75a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or with any decision of another court of appeals. Accordingly, further review is not warranted.

1. Petitioner first argues (Pet. 9-18) that the court of appeals misapplied this Court's decisions on the proper scope of deference to agency interpretations of

---

[3] Judge Niemeyer, dissenting from the judgment insofar as it found that petitioner could be liable for penalties after August 1989, found that Region 4's letters did not "constitute a definitive agency-wide EPA notice such that penalties could be imposed" (Pet. App. 33a).

their own regulations. Alternatively, petitioner suggests (Pet. 22-23) that this Court should "abandon the 'deference' principle and direct the reviewing court to determine the single correct meaning of the [regulation]." Neither claim has merit.

a. Petitioner's first argument is based on a misinterpretation of the decision below. The court of appeals did not defer to EPA's interpretation of the exemption provision "as a matter of course" (Pet. 10), or on the sole basis that the interpretation was "not 'nonsensical'" (Pet. 9, quoting Pet. App. 8a). The court analyzed the language and purpose of the regulatory provision and the statute, and concluded that EPA's interpretation in this case is consistent with both. The court found EPA's interpretation of "use" to be "consistent with the ordinary meaning" of that term, that is "to make use of, to employ" (Pet. App. 7a, quoting *Black's Law Dictionary* 1541 (6th ed. 1990)). The court found that "EPA's interpretation of its own regulatory exemption harmonizes with the purpose of the authorizing statute," which is to achieve "the maximum degree in reduction in emissions of the hazardous air pollutants" subject to the Clean Air Act (Pet. App. 8a, quoting 42 U.S.C. 7412(d)(2)). The court then found that "EPA's interpretation of its exemption accords with the purpose of the exemption itself" which was to exclude only small plants from the leak-prevention requirements (Pet. App. 8a-9a). Petitioner thus errs in arguing (Pet. i, 8, 9-13, 23) that the sole test the court of appeals applied was whether the agency's interpretation was not "nonsensical." The court used that phrase in the course of explaining why EPA's interpretation harmonized with the statute. Pet. App. 8a. But the main thrust of the decision below is that "EPA's inter-

pretation accords with the plain language of the NESHAP, as well as the purposes of the Clean Air Act and of the exemption itself." *Id.* at 10a. Petitioner's warning (Pet. 22) that "the prospect that EPA should be able to read a rule any way EPA pleases so long as that reading is not 'nonsensical' should ring alarm bells in the judiciary," is, accordingly, a false alarm.[4]

Arguing against a straw man, petitioner fails to come to grips with the actual reasoning of the court below. Petitioner instead urges (Pet. 15) that "it is not appropriate for federal courts to defer to agency interpretations that defy the very language of a

---

[4] Amici American Automobile Manufacturers Ass'n, et al. similarly misread the majority opinion as concluding that an agency regional office can establish a binding interpretation of a regulation "notwithstanding that other regions have adopted contrary interpretations." Br. 6. In fact, the majority did not accept petitioner's allegations that Region 4's interpretation was contrary to that of other EPA regional offices. It simply noted that petitioner had presented no evidence that it knew of or relied on any "*asserted* contrary interpretation of 'use' by other EPA offices or state agencies." Pet. App. 23a (emphasis added). While petitioner claimed that EPA Region 6 had approved an interpretation contrary to that of Region 4, the evidence consisted, at most, only of acquiescence by Region 6 in the Texas Air Control Board's largely unexplained grant of exemptions to two plants. *Id.* at 56a-57a. That acquiescence hardly amounted to a contrary interpretation. In any event, it was Region 4's interpretation that followed the consistent guidance provided by EPA headquarters that "use" meant "*processing rates* rather than net consumption." *Id.* at 11a-12a (quoting October 5, 1984 EPA letter). Contrary to amici's claim (Br. 10), Region 4's interpretation was "*authoritative*" because it was clearly explained and consistent with the rulemaking itself and with EPA headquarters' interpretations thereof. Pet. App. 7a-12a.

published rule," ignoring the ruling below that EPA's interpretation is in fact consistent with the plain language of the regulation. Pet. App. 7a. Petitioner nowhere explains why the phrase "designed to * * * use" (*id.* at 124a, quoting 40 C.F.R. 61.110(c)(2)) must mean only "designed to consume" and cannot, as the court of appeals found, mean designed to "utiliz[e]" or "employ[]." *Id.* at 11a. Nor does petitioner suggest how limiting "use" to "consumption" can be reconciled with the statute, since that interpretation would allow plants that are designed to re-use benzene to escape regulation, even though (as was the case with the Celriver Plant) they represent some of the largest sources of benzene leaks. See *id.* at 5a. Petitioner similarly fails to deal with the court of appeals' analysis of the preamble to the regulation and the rulemaking record, which showed that the exemption was intended to apply to a "small plant" (*id.* at 8a, quoting 49 Fed. Reg. 23,510 (1984)) which emits about six megagrams of fugitive benzene per year, not a huge plant like Celriver with annual emissions reaching 226 megagrams per year. *Id.* at 9a. As the court's analysis of the preamble and rulemaking record indicates, petitioner's charge (Pet. 14) that "agency staffers change[d] their minds about what they wish[ed] the law to be" is incorrect; the exemption was never intended to limit "use" to "consumption" so as to exempt a facility like Celriver.[5] In

---

[5] Similarly, since an interpretation that counts all benzene utilized in a process, including recycled benzene, as "used" is consistent with the language and purpose of the rule, there was no need for a new rulemaking, and (contrary to petitioner's submission at Pet. 17 & n.16) no inconsistency with the directive of Section 301(a) of the Clean Air Act, 42 U.S.C.

sum, the decision below rests not on an unthinking deference to any agency construction that is not nonsensical, but on a careful and considered application of this Court's oft-stated rule that an agency's interpretation of its own regulations should be sustained unless "plainly erroneous or inconsistent" with the regulation. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

b. Petitioner seeks to overturn decades of this Court's rulings on deference by urging that "deference is not appropriate where an agency's post-promulgation interpretation of a *regulation* is concerned," and that courts should determine which is the "single correct" or "best" interpretation of a regulation without deferring to the interpretation of the agency. Pet. 22-23. However, this Court has

---

7601(a); Pet. App. 84a, that the Administrator may delegate his powers and duties "except the making of regulations."

Petitioner's complaints of a "secret interpretation" of the regulations (Pet. i), and of interpretations that "were presented, for the first time, in the government's briefs" (Pet. 17 n.15), were also properly rejected by the court of appeals. The court pointed to numerous instances where sources contacted EPA regarding their eligibility for an exemption and were explicitly informed that "the 1,000 megagrams per year cut off limit is applicable to total processing rates, rather than net consumption (usage) or net production." Pet. App. 11a-12a (quoting EPA responses to letters from companies). Thus, the interpretation was hardly "secret." Moreover, petitioner found out only a few months after the regulations had been promulgated that EPA had rejected the use-equals-consumption interpretation in responding to an inquiry from a Texaco facility. *Id.* at 16a. Indeed, petitioner no longer disputes that it received direct notice of this interpretation in the summer of 1989. See Pet. 25-26.

recently reaffirmed the doctrine of deference to agency interpretations of regulations, *Auer* v. *Robbins*, 117 S.Ct. 905, 911 (1997), and has consistently rejected attempts by courts to substitute their own view of the "best" interpretation of agency regulations. *E.g.*, *Arkansas* v. *Oklahoma*, 503 U.S. 91, 112 (1992).

This Court has explained that deference is particularly warranted when a regulation concerns "a complex and highly technical regulatory program," in which applications of the regulation "necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991). That is precisely the situation here, where determining the appropriate scope of an exemption to leak-prevention rules applicable to a great variety of manufacturing operations requires significant technical expertise joined with an appreciation of the statutory policy. See Pet. App. 39a ("A court's review of regulations under Section 112 of the Clean Air Act * * * is particularly limited because of the broad discretion Congress gave EPA to control hazardous air pollutants. * * * This court treads lightly when construing the scope of an exemption that allows a source of hazardous air pollutants to go unregulated."). Petitioner provides no convincing reason for the radical departure it advocates from existing precedent—a departure that would encourage litigation and prolong uncertainty concerning the meaning of regulations.

2. Petitioner does not take issue with the court of appeals' rulings that the company received actual notice of EPA's interpretation of the exemption in the summer of 1989 (Pet. App. 24a), and that the Celriver Plant continued to violate the regulations at least

until August 1992. *Id.* at 26a. Instead, petitioner maintains (Pet. 25-26) that the court of appeals should not have remanded for a determination of possible penalties because the company allegedly was entitled to a waiver of the leak-prevention requirements for two years after receiving EPA's letters in the summer of 1989.

Petitioner does not suggest that the court of appeals' rejection of its waiver theory conflicts with any decision of this Court or any lower court. Moreover, the ruling below (Pet. App. 26a) is plainly correct. Contrary to petitioner's assumption (Pet. 25), a waiver would not have been automatic. Section 112(c)(1)(B)(ii) of the Act (42 U.S.C. 7412(c)(1)(B)(ii) (1988)), provided that "the Administrator *may* grant a waiver permitting such source a period of up to two years after the effective date of a standard to comply," but only "if he finds that such period is necessary for the installation of controls and that steps will be taken during the period of the waiver to assure that the health of persons will be protected from imminent endangerment." Pet. App. 78a-79a (emphasis added).[6] Petitioner's argument (Pet. 25 n. 21) that EPA "*must* grant a waiver when a source makes a showing that satisfies the statutory test," overlooks the discretionary language of the provision.

In any event, petitioner has made no showing that the requirements for a waiver were met for Celriver.

---

[6] EPA's implementing regulations provide that "the Administrator may grant a waiver of compliance with a standard for a period not exceeding 2 years" and set out in detail the requirements for a waiver application, including a description of controls, compliance schedules, and interim emission control steps to be taken during the waiver period. 40 C.F.R. 61.11.

Petitioner suggests (Pet. 25 n. 21) that since its Pampa, Texas, facility was granted a waiver by the Texas Air Control Board in 1985, the Celriver Plant would have qualified for one as well. However, petitioner does not explain why the public health and technological feasibility criteria that govern waivers would apply in exactly the same way at two different plants in different States during different time periods. Had EPA been presented with a waiver application for the South Carolina plant, it would not have been bound by the waiver determination made by the Texas agency.

In sum, petitioner has failed to show any error in the court of appeals' holding that it was not required to assume that petitioner was entitled to a two-year waiver of the benzene leak requirements after it received actual notice of EPA's interpretation of the exemption provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JOHN A. BRYSON
DAVID C. SHILTON
Attorneys

MAY 1998

No. 97-1578

FILED
JUN 5 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY TO BRIEF IN OPPOSITION

ANDREA BEAR FIELD
Counsel of Record
MAIDA O. LERNER
DAVID S. HARLOW
LEE A. CASEY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

DOUGLAS W. DAVIS
JOHN CHARLES THOMAS
CYNTHIA S. CECIL
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

June 5, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
THE MANNER IN WHICH THE FOURTH CIRCUIT "DEFERRED" TO EPA IS COMPLETELY AT ODDS WITH THE PURPOSE AND INTENT OF DEFERENCE AS ARTICULATED BY THIS COURT	2
UNLESS LIMITS ARE PLACED ON THE APPLICATION OF *SEMINOLE ROCK*'S DEFERENCE STANDARD, *SEMINOLE ROCK* SHOULD BE OVERTURNED, AND THIS IS THE VEHICLE FOR DOING SO	5
EPA MISSES THE POINT OF HCC'S ARGUMENT THAT ONCE A COMPANY GETS GOOD NOTICE, IT IS ENTITLED TO A REASONABLE TIME IN WHICH TO COMPLY	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 2, 5, 6, 7, 10

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984) 6

General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) 8, 10

Spencer v. Kemna, —— U.S. ——, 118 S. Ct. 978 (1998) 6

FEDERAL STATUTES

Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* 5

Clean Air Act, 42 U.S.C. § 7401, *et seq.* 5, 8

ARTICLES

John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1578

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

EPA has it wrong. This seemingly "little case"—which the government would dismiss out of hand—is much more important to the nation than EPA will ever admit. The point of this case is that EPA—though pursuing the worthy goal of environmental protection—has far exceeded any power it has or could ever have under our system of government. This case is about separation of powers; about who says what the law is; about the remedy that a citizen is entitled to once a court has ruled that the federal government has infringed his rights.

EPA has every incentive to say to this Court, "don't look at this case" because this case demonstrates that EPA has found a way to make itself a law unto itself. And EPA does not want to be "found out" even though the result of its actions is that there is greater uncertainty

about what its rules mean and more obstacles in the paths of those that want to comply.

THE MANNER IN WHICH THE FOURTH CIRCUIT "DEFERRED" TO EPA IS COMPLETELY AT ODDS WITH THE PURPOSE AND INTENT OF DEFERENCE AS ARTICULATED BY THIS COURT.

The present day incarnation of the deference standard dates back to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), where this Court said that an agency's "interpretation [of its own regulations] becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* at 414. In the 53 years since *Seminole Rock* was decided, the essence of the "plainly erroneous or inconsistent with the regulation" phrase has been eaten away until today the Fourth Circuit—and other circuits—act as if *Seminole Rock* stands for the raw proposition that, in almost all circumstances, an agency's interpretation of its own regulations must be given "controlling weight."

Had the federal courts consistently followed the actual holding in *Seminole Rock*, they would have retained the ability to look at objective criteria in determining the propriety of agency conduct. In this case, that would have meant an examination of the actual language of the rule, what the Administrator actually said in the accompanying preamble, and the actual examples used by EPA at the time of promulgation.

The preamble to the final benzene NESHAP, in fact, describes the types of sources that were to be covered by the exemption: **both** "small process units" **and** "process units that use minor amounts of benzene."[1] HCC's Celriver Plant—with thousands of pieces of equipment in benzene service—is clearly not a small unit. But Celriver

[1] *See* App. 112a. The government's opposition to HCC's petition for certiorari noticeably fails to acknowledge that part of the preamble that says the exemption applies to process units that use minor amounts of benzene. *See* Opp'n at 9.

was a *user of a minor amount of benzene* when compared to the key targets of the original benzene NESHAP rulemaking: benzene producers and feedstock users. At the time EPA was developing the benzene NESHAP, production facilities and feedstock users of benzene annually produced and used millions of megagrams of benzene and were responsible for 99.5% of all benzene emissions.[2] Compared to such sources, a facility like Celriver—that had on site only a few hundred megagrams of benzene per year—was indisputably a user of "minor amounts" of benzene.

Even more importantly, the preamble to the final benzene NESHAP contains a specific example of how the exemption applied to a user of minor amounts of benzene. (App. 113a.) The example concerned a pharmaceutical company that, just like HCC's Celriver Plant, used recycled benzene as a solvent and had far more than a thousand pieces of equipment in benzene service. Similarly, the pharmaceutical company's facility used a lot more than 1,000 megagrams of benzene if the benzene were to be counted over and over again as it recycled through the facility's processes. And, like Celriver, that pharmaceutical company's facility was designed to consume (*i.e.*, "use up")[3] several hundred megagrams of benzene (but less than 1000 megagrams of benzene) per year.[4] In the preamble, EPA established that facilities that used or consumed benzene in this way and in these amounts *were exempt* from the NESHAP.

---

[2] *See* 4th Cir. J.A. at 392, 402, 552-55.

[3] Despite the government's claim to the contrary (Opp'n at 9), HCC has repeatedly explained that, while the word "use" can admit of more than one interpretation, EPA in the preamble to the rule resolved any ambiguity in this regard by establishing that, in the context of the exemption, "use" of benzene means a single counting of benzene. *See* Cert. Pet. at 3; App. 42a.

[4] To maintain their financial viability, benzene-recycling processes must remain efficient, *i.e.*, they have to minimize their leakage of benzene. Thus, before EPA developed its own program in the 1984

These authoritative statements by the Administrator—presented in the final rule—should have been binding upon EPA and should have led to a quick disposition of this case in favor of HCC. After all, that is what EPA had said the rule was.

Yet, EPA has—in six years of litigation—been able to slip the constraints of its own published rule by piecing together snippets of the rulemaking record to present a story that reads well but is so out-of-kilter with what EPA actually said at the time of NESHAP promulgation that:

- All four judges who have reviewed this case have concluded that EPA's "story" could not have been gleaned by HCC from the regulatory language, the preamble, or the rest of the record (App. 17a-18a, 28a, 62a);
- Regulators from EPA's own staff and from Virginia and Texas failed to comprehend what EPA now says its rule means (App. 54a-57a); and
- It conflicts with the unrebutted expert testimony about the plain meaning of the technical terms that underlie the rule.[5]

EPA has glossed over all these inconsistencies by claiming that its current interpretation is consistent with the

---

NESHAP, Celriver had in place a benzene leak detection and repair program. As a result of that program, Celriver's annual consumption of benzene was far less than the 1,000 megagram exemption cut-off (*see* 4th Cir. J.A. at 296). Indeed, it was significantly less than the 325 megagrams consumed by the preamble-discussed pharmaceutical facility. (App. 113a.)

[5] *See* Cert. Pet. at 15 n.13. For example, although EPA now claims that the exemption was based upon a plant's design production capacity (Opp'n at 3), that concept—like nameplate capacity—is a single count concept. (App. 185a.) "Indeed, none of the capacity data studied by EPA [during the rulemaking] involved quantities inflated by some form of multiple counting of internal recycle. This is despite the fact that virtually all producers and most benzene-using facilities, by their very nature, have internal recycle." (App. 185a-186a.)

alleged "purpose" of the rule. (Opp'n at 9 n.5.) And the Fourth Circuit deferred to EPA's interpretation because that interpretation "harmonizes with the purpose of [the Clean Air Act]." (App. 8a.)

It is irrelevant to the proper disposition of the instant case, though, that regulation of the Celriver Plant can be "harmonized with the purposes" of the Clean Air Act. That means only that EPA **could** have promulgated an exemption to the benzene NESHAP that is based on multiple counting. Because that is not what EPA said it was doing—in either its regulatory language or the accompanying preamble—that is not a permissible way to interpret the exemption now before the Court.[6]

The Court should grant certiorari in this case to make clear to the federal courts that there are real limits to deference and that this Court did not in 1945—nor does it today—intend for deference to mean that federal agencies can engage in the kind of "revisionist rulemaking" evident in this case.

UNLESS LIMITS ARE PLACED ON THE APPLICATION OF *SEMINOLE ROCK*'S DEFERENCE STANDARD, *SEMINOLE ROCK* SHOULD BE OVERTURNED, AND THIS IS THE VEHICLE FOR DOING SO.

EPA argues in its Opposition that overturning *Seminole Rock* is essentially unthinkable because that decision has been in place since 1945 and its progeny has built up over the years. HCC disagrees because, in HCC's view, the longer a faulty legal concept is allowed to stand, the more compelling is the reason to swat it down. As members of this Court have observed, "[w]isdom too often never

---

[6] Nor is it appropriate for EPA to try to distance itself from the Administrator's explanation of the exemption at the time of promulgation by claiming that explanation was a "mistake" or "accident." *See* 4th Cir. J.A. at 65-66, 72-73. If it was a mistake, EPA should have used notice-and-comment rulemaking procedures to correct its mistake, as required by the Administrative Procedure Act and Clean Air Act. *See* Cert. Pet. at 5.

comes, and so one ought not to reject it merely because it comes late." *See, e.g., Spencer v. Kemna*, —— U.S. ——, 118 S.Ct. 978, 990 (1998) (Ginsburg, J., concurring), *quoting Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

EPA contends that HCC has not given a good reason for overturning *Seminole Rock* and its progeny. But HCC argued in its Petition (Cert. Pet. at 19-24) and repeats here that EPA is being allowed to usurp the judicial function, *i.e.*, violate separation of powers. HCC is not the first or only one to see the harm that *Seminole Rock* has led to and to call for a new look by this Court at that decision. In his article, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996), Professor John F. Manning discusses the need for this Court to revisit *Seminole Rock*. He argues that *Seminole Rock* and its progeny, "contradict[] a major premise of our constitutional scheme and of contemporary separation of powers case law—that a fusion of lawmaking and law-exposition is especially dangerous to our liberties." *Id.* at 617 (footnote omitted).

Also, despite the commonly perceived close association between deference to agency interpretations of their own regulations under *Seminole Rock* and the deference courts give to agency interpretations of statutes they are charged with implementing under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the logic of *Chevron* runs contrary to the notion that an agency, having adopted a rule whose meaning is unclear, should be deemed as also having the authority to state virtually conclusively what that meaning is through a post-promulgation interpretation. For whereas "*Chevron* retains *one* independent interpretive check on lawmaking by Congress, *Seminole Rock* leaves in place *no* independent interpretive check on lawmaking by an administrative agency." Manning at 639 (emphasis in original).

EPA is similarly wrong in claiming that to depart from *Seminole Rock* would "encourage litigation and prolong

uncertainty concerning the meaning of regulations." (Opp'n at 11.) The instant case concerns a regulatory provision first promulgated 14 years ago. It is hard to imagine that departing from *Seminole Rock* could "prolong uncertainty" over the "meaning of regulations" any longer than is now the case.

Nor is there any merit to EPA's contention that to depart from *Seminole Rock* would "encourage litigation." HCC submits that getting rid of the *Seminole Rock* line of cases could well serve to curb litigation: once agencies know that the federal courts will no longer give "knee-jerk" deference to agency interpretations of their rules, those agencies would try harder to promulgate clearer, more readily understandable rules. And that would lead to less litigation.

EPA MISSES THE POINT OF HCC'S ARGUMENT THAT ONCE A COMPANY GETS GOOD NOTICE, IT IS ENTITLED TO A REASONABLE TIME IN WHICH TO COMPLY.

The Fourth Circuit ruled in HCC's favor with respect to "fair notice," agreeing that HCC's Celriver Plant did not, at the outset, receive the notice of the meaning of the rule that the Constitution calls for. Rather, said the Fourth Circuit, Celriver did not receive notice of the meaning of the rule until five years later, in the summer of 1989.[7]

HCC submits that once the Fourth Circuit concluded that fair notice came late in the day, it should have fash-

---

[7] Despite the government's claims to the contrary (Opp'n at 11-12), HCC has never conceded that it had violated the benzene NESHAP, although the company had substantially met (and, in some instances, exceeded) the terms of NESHAP by September 1991. Moreover, for the reasons explained by both Judge Anderson (App. 69a) and Judge Niemeyer (App. 33a), nothing that HCC received from EPA Region 4 in or after the summer of 1989 constituted "actual notice" that multiple counting was the Agency's authoritative interpretation since it conflicted with the preamble and, even after the summer of 1989, EPA representatives continued to espouse differing interpretations of the exemption.

ioned a remedy that would have put HCC in at least no worse a position than HCC would have been in had HCC received good notice from the start. But the Fourth Circuit did just the opposite. Its remedy with respect to "fair notice"—saying that HCC would be liable for violating EPA's rule if it did not meet the numerous terms of that rule within just 90 days—puts HCC in a much worse position than it would have been in had it gotten proper notice at the outset.

Contrary to what EPA says, HCC's position is not that it "was entitled to a waiver of the [NESHAP] requirements for two years after receiving EPA's letters in the summer of 1989." (Opp'n at 12.) Rather, HCC contends that, under basic principles of due process, a regulated party—upon being given actual notice of an agency's regulatory interpretation—is entitled to a reasonable period of time in which to conform to that interpretation. Absent that, the "fair notice" concept, as most recently expressed in such cases as *General Elec. Co. v. EPA*, 53 F 3d 1324, 1328-31 (D.C. Cir. 1995), is shorn of most, if not all, of its meaning and effect.

Thus, rather than contending it had a "right" to a waiver, HCC asserts that in deciding whether HCC had met the terms of the NESHAP "within a reasonable time" following receipt of actual notice, it was fitting and proper for the district court to take into account the compliance time-frame set out by § 112 of the Clean Air Act and EPA's own rules. Those provisions gave regulated entities at least 90 days in which to comply and the opportunity to obtain a waiver for up to two years in which to achieve compliance. *See* 4th Cir. J.A. at 78a-79a, 156a. Those two provisions establish that a two-year compliance period is reasonable for someone who got good notice at the start of the process.[8] Because it is undisputed that

[8] Had HCC received notice that it was subject to the NESHAP at the time the rule was promulgated, it would have been prepared to move promptly to apply for the waiver that was then available.

HCC met virtually all the terms of the benzene NESHAP at its Celriver Plant within the two-year time frame that both Congress and EPA have defined to be reasonable, HCC should not be subject to liability within that two-year period. If it is subject to liability starting 90 days from receipt of good notice, HCC is in a much worse position than it would have been in with good notice from the start.

The district court understood and agreed with this reasoning. Indeed, the court found that HCC "acted responsibly to meet—and far exceed—the terms of the NESHAP in advance of EPA-accepted deadlines" and thus that a finding of liability for its compliance within that stipulated time frame would be inconsistent with "fundamental considerations of fairness." (App. 69a-70a.)

The Fourth Circuit's majority holding to the contrary—a holding that HCC was "necessarily" required to have been in compliance in no more than 90 days—is unjust. It penalizes HCC for EPA's failure to have provided fair notice of its multiple counting interpretation in 1984, when there were procedures in place which would have allowed HCC to seek additional time to comply.

It is important that the Court take this case and reverse the Fourth Circuit, not only to correct an injustice but to clarify how the concept of "actual notice" is to work in relation to the "fair notice" principle. As best HCC can determine, there are no other decisions in which a court has grappled with the issue of how much time should be considered reasonable for a regulated entity to come into compliance with a regulation after an agency has sup-

---

Five years later, that waiver was no longer available—the chance to seek it expired in September 1984 (*see* App. 156a)—and it was unclear what procedures HCC was supposed to follow in order to secure a reasonable time in which to meet the standards. So HCC did the best it could: it met with EPA representatives and followed a compliance course consistent with the one it set out for EPA and to which EPA never objected. *See* App. 69a-71a.

posedly provided that entity with "actual notice" of a regulatory interpretation.

It is inevitable, though, that the federal courts will face more regulatory enforcement cases construing *General Electric*'s "fair notice" principles. Indeed, this would appear all the more certain if the Court declines to revisit *Seminole Rock* or otherwise fails to impose some meaningful restrictions on courts that would otherwise give deference to any not "nonsensical" agency interpretation, thereby elevating the importance of "fair notice" as the last line of defense for the regulated community. At a minimum, therefore, this case provides the Court with the opportunity not only to correct the Fourth Circuit's error, but also to resolve and clarify other important fair notice-related issues that lower courts will be facing in the future.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANDREA BEAR FIELD
Counsel of Record
MAIDA O. LERNER
DAVID S. HARLOW
LEE A. CASEY
HUNTON & WILLIAMS
1900 K Street, N.W.
Washington, D.C. 20006
(202) 955-1500

DOUGLAS W. DAVIS
JOHN CHARLES THOMAS
CYNTHIA S. CECIL
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

June 5, 1998

(2)

Supreme Court, U.S.
FILED
APR 22 1998
CLERK

No. 97-1578

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICI CURIAE* OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FIBER MANUFACTURERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND TEXAS CHEMICAL COUNCIL IN SUPPORT OF PETITIONER

PAUL G. WALLACH
Counsel of Record
WENDY E. ANDERSON
JAMES G. VOTAW
HALE AND DORR LLP
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 942-8400
Counsel for Amici Curiae

April 22, 1998

(Additional Counsel listed on inside cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23 pp

DAVID F. ZOLL
Vice President and
General Counsel
JAMES W. CONRAD, JR.
Managing Counsel
CHEMICAL MANUFACTURERS
ASSOCIATION
1300 Wilson Boulevard
Arlington, VA 22209
(703) 741-5000

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF
MANUFACTURES
1331 Pennsylvania Ave., N.W.
Sixth Floor
Washington, D.C. 20004
(202) 637-3000

RUSSEL A. BANTHAM
Senior Vice President and
General Counsel
MARJORIE E. POWELL
Assistant General Counsel
PHARMACEUTICAL RESEARCH AND
MANUFACTURERS OF AMERICA
1100 15th Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 835-3400

G. WILLIAM FRICK
Vice President, General Counsel
and Secretary
ALICE M. CROWE
Senior Attorney
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 682-8000

DONALD GREELEY
General Counsel
AMERICAN FIBER
MANUFACTURERS ASSOCIATION
1150 17th Street, N.W.
Suite 310
Washington, D.C. 20036
(202) 296-6508

JULIE C. BECKER
Senior Attorney
AMERICAN AUTOMOBILE
MANUFACTURERS ASSOCIATION
1401 H Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 326-5511

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE FOURTH CIRCUIT'S DECISION CREATES TREMENDOUS UNCERTAINTY IN THE REGULATED COMMUNITY, UPSETS THE UNIFORM ADMINISTRATION OF FEDERAL REGULATORY PROGRAMS, AND LEADS TO CONFLICTS AMONG AND WITHIN THE CIRCUIT COURTS OF APPEALS	6
II. THE FOURTH CIRCUIT'S DEFERENCE TO AN EPA REGIONAL OFFICE REGULATORY INTERPRETATION CANNOT BE RECONCILED WITH THE DECISIONS OF THIS COURT	8
A. The Interpretation Was Not Authoritative Because It Was Not Consistently Applied By The Agency	11
B. The Interpretation Was Not Authoritative Because It Was Neither Published Nor Widely Disseminated By The Agency	13
III. THE FOURTH CIRCUIT'S DECISION NULLIFIES IMPORTANT CONSTITUTIONAL DUE PROCESS PROTECTIONS	14
A. The Fourth Circuit Erred In Concluding That Conflicting Agency Interpretations Of A Regulation Provide Fair Notice	14
B. The Fourth Circuit's Ruling Denies Petitioner A Reasonable Opportunity To Comply	16
CONCLUSION	18

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)	10
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)	9, 10, 12, 13
Contractors Transport Corp. v. United States, 537 F.2d 1160 (4th Cir. 1976)	7
Director, Office of Workers' Compensation Programs v. Mangifest, 826 F.2d 1318 (3d Cir. 1987)	13
Federal Labor Relations Auth. v. United States Dept. of Navy, 966 F.2d 747 (3d Cir. 1992)	13
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980)	8, 9, 13
General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995)	16
Grayned v. City of Rockford, 408 U.S. 104 (1972)	16
Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987)	7, 8, 13
Martin v. Occupational Health & Safety Comm'n, 499 U.S. 144 (1991)	8, 9
McElroy Electronics Corp. v. FCC, 990 F.2d 1351 D.C. Cir. 1993)	17
Miner v. FCC, 663 F.2d 152 (D.C. Cir. 1980)	7
Morton v. Ruiz, 415 U.S. 199 (1974)	13
Mullins Coal Co., Inc. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987)	9
National Family Planning and Reproductive Health Ass'n v. Sullivan, 979 F.2d 227 (D.C. Cir. 1992)	14
Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991)	9
Rollins Envtl. Serv. (NJ), Inc. v. EPA, 937 F.2d 649 (D.C. Cir. 1991)	15
Satellite Broadcasting Co. v. FCC, 824 F.2d 1 (D.C. Cir. 1987)	17
Thomas Jefferson University v. Shalala, 114 S.Ct. 2381 (1994)	9
Udall v. Tallman, 380 U.S. 1 (1965)	9, 13

TABLE OF AUTHORITIES—Continued

	Page
United States v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir. 1995)	13
Western States Petroleum Ass'n v. EPA, 87 F.3d 280 (9th Cir. 1996)	7
FEDERAL ADMINISTRATIVE DECISIONS	
CWM Chemical Serv., Inc., TSCA Appeal No. 93-1, 6 E.A.D. 1 (E.A.B. May 15, 1995)	10
FEDERAL STATUTES AND REGULATIONS	
Clean Air Act, 42 U.S.C. § 7401, *et seq.*	7
40 C.F.R. § 56.3(a) (1997)	16
40 C.F.R. § 61.11 (1997)	17
40 C.F.R. § 61.110(c) (1997)	6
FEDERAL LEGISLATIVE MATERIALS	
H.R. Conf. Rep. No. 91-1783, *reprinted in* 1970 U.S.C.C.A.N. 5374 (1970)	17
LAW REVIEWS	
Manning, J., *Constitutional Structure and Judicial Deference To Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (April 1996)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1578

HOECHST CELANESE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF *AMICI CURIAE* OF AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FIBER MANUFACTURERS ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, CHEMICAL MANUFACTURERS ASSOCIATION, CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AND TEXAS CHEMICAL COUNCIL IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

The American Automobile Manufacturers Association ("AAMA"), American Fiber Manufacturers Association

---

[1] This brief is filed with the written consent of the parties, pursuant to Rule 37.2(a) of the Rules of this Court. Letters of consent are on file with the Clerk of the Court. Pursuant to Rule 37.6,

("AFMA"), American Petroleum Institute ("API"), Chemical Manufacturers Association ("CMA"), Corporate Environmental Enforcement Council ("CEEC"), National Association of Manufacturers ("NAM"), Pharmaceutical Research and Manufacturers of America ("PhRMA") and Texas Chemical Council ("TCC") file this brief as *amici curiae* in support of Hoechst Celanese Corporation's ("HCC") Petition for A Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

AAMA is the trade association comprised of the major United States-based automobile manufacturing companies — Chrysler Corporation, Ford Motor Company and General Motors Corporation. AAMA's member companies own and operate 276 assembly and component manufacturing facilities nationally.

AFMA represents U.S. companies that manufacture and sell synthetic and cellulosic fibers. AFMA member companies produce more than 90% of the total U.S. output of these fibers.

API is a national trade association representing more than 400 member companies involved in all aspects of the oil and gas industry, including exploration, production, refining, transportation, distribution and marketing of petroleum and petroleum products.

CMA is a non-profit trade association whose member companies represent more than 90% of the productive capacity for basic industrial chemicals in the United States. Many CMA members, including HCC, are subject to the benzene NESHAP at issue in this case.

Amici state that this brief was authored in its entirety by counsel for *Amici*. *Amici* CMA, CEEC, NAM and PhRMA also participated as *amici curiae* in the proceedings before the Fourth Circuit Court of Appeals.

CEEC is a nonprofit organization of 18 diverse companies with strong environmental programs and commitments. CEEC focuses exclusively on environmental enforcement policy issues, in an attempt to ensure that environmental enforcement is consistent with and advances the goal of our environmental laws.

The NAM is the nation's oldest and largest broad-based industrial trade association. Its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council.

PhRMA represents the country's leading research-based pharmaceutical and biotechnology companies. Central to PhRMA's purposes as an organization is the representation and protection of the interests of companies that discover, develop, and bring prescription drugs to market. This industry depends on the ability to rapidly adapt production to introduce new, life-saving medicines to meet the demand for these drugs.

TCC is a non-profit association representing chemical manufacturers in the State of Texas. Its 97 member companies represent about 25% of the State's manufacturing economy. TCC members have over $40 billion invested in Texas facilities and result in the employment of over 450,000 Texans with a total annual payroll of over $15 billion. As a trade association in a state that had corresponded with EPA on this subject, TCC is vitally interested in the outcome of this action.

All of *Amici's* members are heavily regulated by EPA and other agencies, and are committed to complying with the law. *Amici* have tens of thousands of members, ranging from small businesses to large multinational corporations, who collectively have facilties in each of the fifty

states. *Amici* have a vital interest in seeing that regulatory requirements are clear, well-publicized and consistently applied across the country. *Amici* similarly believe that regulatory enforcement must be fair and that enforcement actions should focus on clear cases of non-compliance, rather than on cases involving the application of non-authoritative or inconsistent interpretations of national regulations.[2]

SUMMARY OF ARGUMENT

Nominally, the Petition for *Certiorari* concerns the ruling of the Fourth Circuit on the meaning of an exemption set forth in a rule promulgated by the United States Environmental Protection Agency ("EPA") on June 6, 1984, as part of benzene emission standards known as the National Emisssion Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene (the "benzene NESHAP"). In reality, the impact of the Fourth Circuit's decision is unfortunately much broader. At the heart of *Amici's* interests is their concern that the judgment of the Fourth Circuit will create uncertainty and disrupt environmental and other federal regulatory programs that impact almost every aspect of the operations of *Amici's* members.[3]

Of principal concern to *Amici* is the Fourth Circuit's ruling that the interpretation of a nationally applicable regulation by one of EPA's regional offices binds persons within that office's geographic jurisdiction, regardless of whether its interpretation conflicts with interpretations of other regional offices, or even if it conflicts with other interpretations from within the same office. (*See* Pet.

---

[2] As *Amici's* members include literally tens of thousands of businesses across the country, this brief should not necessarily be regarded as the view of any one organization or company.

[3] Although *Amici* often refer to environmental impacts as examples in this brief, as noted above, the opinion of the Fourth Circuit has broad ramifications that extend well beyond the environmental law contect.

App. at 23a-24a.) If left to stand, the Fourth Circuit's opinion means that every regional office of a federal administrative agency can establish its own binding interpretation of a national regulation. For environmental programs, this could result in the creation of ten sets of rules, as EPA has ten regional offices. As a result, *Amici's* members would find that a federal regulation in one state means something different in another state, even as applied to identical facilities and processes. Indeed, that is precisely what happened to the Petitioner in this case.

The opinion below will also likely result in conflicts among the circuits. If a particular regional office interpretation is upheld by a Federal Court of Appeals, it becomes the law of that circuit. However, another regional office may interpret a regulatory requirement differently, and its interpretation could become the law in a different circuit. In addition, the opinion of the Fourth Circuit could lead to intra-circuit conflicts, because the jurisdictions of EPA's regional offices do *not* parallel those of the federal circuits.

Amici have other substantial concerns with the Fourth Circuit's decision. HCC's Petition describes a now all too common occurrence for *Amici's* members—enforcement actions alleging regulatory violations based solely on non-authoritative and non-published agency interpretations of the meaning of regulatory requirements. Citizens and regulated entities were previously able to rely on the courts to remedy the situation. No such meaningful review can occur, however, when agencies revise regulations through unpublished, nonauthoritative interpretations *and* courts incorrectly apply this Court's decisions by deferring to such interpretations.

Amici are also concerned about the due process implications of the Fourth Circuit's opinion. Although the Fourth Circuit determined that EPA had not initially provided fair notice of the interpretation Region IV applied, it did not allow HCC a meaningful opportunity to achieve

compliance once it learned of the Region IV interpretation. HCC was also denied the opportunity to utilize the two-year compliance waiver available to every member of the regulated community to whom the regulation applied. Instead the court required HCC to fully comply within ninety days of its receipt of the EPA Region IV interpretation. Thus, the Fourth Circuit failed to rectify the very due process violations it had identified. *Amici* believe that elemental notions of due process require that individuals and firms in HCC's position must be allowed as much time to comply with a regulatory requirement as they would have had if an agency had provided proper notice *ab initio*.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CREATES TREMENDOUS UNCERTAINTY IN THE REGULATED COMMUNITY, UPSETS THE UNIFORM ADMINISTRATION OF FEDERAL REGULATORY PROGRAMS, AND LEADS TO CONFLICTS AMONG AND WITHIN THE CIRCUIT COURTS OF APPEALS

The Fourth Circuit concluded that regional offices of an administrative agency can establish authoritative interpretations of regulations that bind affected parties within their regions, notwithstanding that other regions have adopted contrary interpretations. If allowed to stand, that holding has the potential to upset any federal program requiring the application of uniform standards.

The Fourth Circuit deferred to EPA Region IV's interpretation of the benzene NESHAP exemption, (Pet. App. at 12a), even though other EPA regions had interpreted the exemption differently.[4] The Fourth Circuit also held

[4] Facilities that "use" less than 1,000 Mg/yr of benzene are exempt from the regulation. 40 C.F.R. § 61.110(c). The 1989 Region IV "multiple counting" interpretation of the term "use" requires facilities to measure the same benzene again and again as it is recycled through the equipment. That interpretation was "based on," (Pet. App. at 66a), an unpublished 1984 EPA internal

that HCC was bound to comply with the interpretation "from the EPA Regional Office responsible for the State of South Carolina where the plant in question is located—regardless of any conflict with previous guidance received . . . from an [authorized] agency with no authority in South Carolina," (Pet. App. at 24a), because only that office had enforcement authority over HCC. (*See* Pet. App. at 23a.)

This means that, as in HCC's case, similar facilities engaged in the same activities under the same nationally applicable regulation can be subject to different regulatory requirements in different agency regional office jurisdictions. Such a result is simply not acceptable. *See, e.g., Miner v. FCC*, 663 F.2d 152, 157 (D.C. Cir. 1980) ("[T]he Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them"); *Contractors Transport Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) ("Patently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary").

Where federal administrative agencies develop and implement uniform national standards pursuant to national legislation, such as under the Clean Air Act, 42 U.S.C. § 7401, et seq., agencies must assure that those standards are fairly and evenly applied. When the agency fails, the courts must protect the public from arbitrary agency action by deferring only to consistently applied and authoritative interpretations. *See, e.g., Western States Petroleum Ass'n v. EPA*, 87 F.3d 280, 285 (9th Cir. 1996); *Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987).

---

staff memorandum that interpreted the term "use" to mean benzene "throughput," not just consumption. (Pet. App. at 12a; 30a-31a.) This internal memorandum was in turn distributed to EPA regional offices and subsequently became the basis for a number of conflicting "interpretations" of the scope by the exemption by different EPA regions and States. (Pet. App. at 11a-12a; 62a; 65a.)

In addition to causing conflicts within agencies, the Fourth Circuit's decision will inevitably lead to conflicts among the Federal Courts of Appeals. When those courts rule on a regional office's interpretation of a regulation, that decision becomes the law of a circuit. Rulings on inconsistent regional office interpretations of the same regulation in different circuits will create conflicting precedent. *See Homemakers,* 832 F.2d at 412 (7th Cir. 1987). This result, like the regional inconsistencies themselves, would cause uneven administration of national rules, create tremendous uncertainty and make compliance difficult. Indeed, for many of *Amici's* members compliance may be impossible because EPA's ten administrative regions do not geographically parallel the jurisdictions of the Federal Courts of Appeals.

The regulated community devotes substantial resources to understanding and complying with environmental regulations and in many cases exceeding compliance with them. Compliance becomes problematic at best, however, if it is not possible to rely upon agency regulations or if a regulated entity is forced to choose between competing regional office interpretations. Sound business planning requires certainty, but the Fourth Circuit's decision would, if not reversed, lead to multiple and inconsistent agency interpretations of the same regulatory requirement. This Court should not allow this result to occur.

II. THE FOURTH CIRCUIT'S DEFERENCE TO AN EPA REGIONAL OFFICE REGULATORY INTERPRETATION CANNOT BE RECONCILED WITH THE DECISIONS OF THIS COURT

This Court has repeatedly indicated that deference should be given to interpretations by an agency of its own rules.[5] This Court's rule of deference to agency interpretations is based on at least three related considerations:

---

[5] *E.g., Martin v. Occupational Health & Safety Comm'n,* 499 U.S. 144, 150 (1991); *Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555,

- Agency interpretations involve the application of agency-wide expertise and judgment grounded in policy concerns conducted under authority delegated to the agency by Congress; [6]
- Agencies are presumed to have greater familiarity [illegible] expertise with the policy issues implicated by an interpretation than courts; [7] and
- An agency is in the best position to know what it meant when it issued its regulations.[8]

Each of these considerations presumes that the interpretation at issue represents the official, considered and authoritative interpretation of the agency, and this Court has looked for and noted the indicia of an "authoritative" agency interpretation as support for giving deference. One such indicator is publication or wide dissemination of the interpretation. *See, e.g., Ford Motor Credit Co. v. Milhollin,* 444 U.S. 555, 566 (1980); *Udall v. Tallman,* 380 U.S. 1, 4 (1965); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 417 (1945). Another indicator of an "authoritative" interpretation is whether it reflects a consistently held view of the agency. *See, e.g., Martin v. Occupational Health & Safety Comm'n,* 499 U.S. 144, 157 (1991); *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 698-99 (1991); *Ford Motor Credit,* 444 U.S. at 557;

---

566 (1980); *Udall v. Tallman,* 380 U.S. 1, 4, 16 (1965); *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945).

[6] *See, e.g., Martin,* 499 U.S. at 151; *Ford Motor Credit,* 444 U.S. at 566, 568.

[7] *See, e.g., Thomas Jefferson University v. Shalala,* 114 S.Ct. 2381, 2387 (1994); *Martin,* 499 U.S. at 152-53; *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 697 (1991); *Ford Motor Credit,* 444 U.S. at 566 n.9.

[8] *See, e.g., Martin,* 499 U.S. at 152-53; *Mullins Coal Co., Inc. v. Director, Office of Workers' Compensation Programs,* 484 U.S. 135, 159 (1987); *Ford Motor Credit,* 444 U.S. at 566; *Seminole Rock,* 410 U.S. at 417.

Tallman, 380 U.S. at 4; *Seminole Rock*, 325 U.S. at 417-18.

That an interpretation is an *authoritative* interpretation of the agency is the foundation on which the deference principle rests. If the interpretation at issue is not authoritative—if it does not reflect the final view of the agency, as an agency, applying its considered expertise and judgment—there is no basis for giving deference.[9] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988).

EPA itself has recognized the difference between authoritative agency interpretations and non-authoritative interpretations of a regional office. For example, in *CWM Chemical Serv., Inc.*, TSCA Appeal No. 93-1, 6 E.A.D. 1 (E.A.B. May 15, 1995), EPA's Environmental Appeals Board ("EAB")[10] rejected an EPA regional office's interpretation of a regulation where there was no agency-wide written embodiment of that interpretation of which the respondent could have had notice—only the beliefs and opinions of individuals within the agency. The EAB reasoned that where the agency had not taken a formal position on the issue, there was no authoritative interpretation, or as the EAB succinctly stated: "[One simply] cannot have 'notice' of a non-existent rule." *CWM Chemical Serv.*, 6 E.A.D. at 15.

In this case, the court erred by not evaluating whether the regional office interpretation it applied met the standard for an authoritative agency interpretation to which

---

[9] In addition, *Amici* believe that it was not appropriate for the Fourth Circuit to have utilized a standard so deferential that it effectively forecloses meaningful judicial review of agency interpretations. *Amici* share HCC's concern regardig the lower courts' abdication of judicial review (Pet. at 11), and believe it is an important independent basis justifying review by this Court.

[10] The EAB, established in 1992, is the final agency decision maker in administrative appeals arising under environmental statutes administered by the EPA.

deference is owed.[11] It also erred because, looking to the criteria identified by this Court, the Region IV interpretation is not an authoritative agency interpretation.

A. The Interpretation Was Not Authoritative Because It Was Not Consistently Applied By The Agency

The Fourth Circuit recognized that there were a series of contradictory interpretations of the term "use" in the benzene NESHAP by EPA regional offices and state agencies. (Pet. App. at 23a.) In his dissent, Judge Niemeyer emphasized that, in fact, there was no agency-wide, consistently held interpretation of the proper way to measure "use" under the regulation.[12] The States of Virginia and Texas (where Petitioner has plants similar to the one in South Carolina at issue in this case) each filed an *amicus curiae* brief below explaining, among other things, that Region IV's interpretation represented a change from what had been communicated to those states as the appropriate interpretation of the regulation.[13]

When Region IV notified HCC of its interpretation in June 1989, "EPA" had endorsed at least three different

---

[11] As a result, deference was given to an interpretation that simply mak s no sense. The common sense example HCC uses best illustrates the irrationality of Region IV's position, *i.e.*, by analogy to the "use" of motor oil in an automobile, instead of four, five or six quarts, Region IV would have us believe that an automobile "uses" thousands of quarts of oil a year because of the constant recirculation of the same oil in an engine. (Pet. at 4.)

[12] The District Court also found that "EPA's regional offices were inconsistent as to how the regulation should be applied, and on various occasions from 1984 through at least 1990, told inquiring companies that the exemption was to be based on a single counting of recycled benzene." (Pet. App. at 65a.)

[13] *See* Brief of *Amicus Curiae* Texas Natural Resources Conservation Commission at 2; Brief of *Amici Curiae* Commonwealth of Virginia and Virginia Department of Environmental Quality at 4, *United States v. Hoechst Celanese Corporation*, 128 F.3d 216 (4th Cir. 1987) (Nos. 96-2003, 96-2051).

methods of measuring "use," and had not issued any national guidance to clarify which approach, if any, represented agency policy. (Pet. App. at 32a.) In fact, *there were even different interpretations within Region IV*. At the same time Region IV was sending its letter to Petitioner and interpreting the appropriate measure of "use" as "throughput," Region IV also sent a letter to another facility indicating that the appropriate measurement was "consumption." (Pet. App. at 68a & n.22. *See also* Pet. App. at 69a n.23.) Thus, it cannot be said that the regional office—much less the Agency, as an *agency*—had made an authoritative interpretation entitled to deference from the Fourth Circuit. *Cf. Seminole Rock*, 325 U.S. at 417-18 (deference was appropriate where the agency had maintained a uniform interpretation "in . . . countless explanations given to inquirers affected" by the regulation).

Rather, as the District Court and Judge Niemeyer recognized, no authoritative agency interpretation of the regulation existed in June of 1989:

> [Region IV's] notice should not, against the background of inconsistent EPA interpretations over time and throughout different regions, constitute a definitive agency-wide EPA notice such that penalties could be imposed for non-compliance with one interpretation. For these reasons, I firmly believe . . . that the 1989 Region IV notice should not be considered the 'authoritative interpretation' of the EPA.

(Pet. App. at 33a (dissent); *See also* Pet. App. at 68a.) There was no single construction of the regulation that was consistently applied, and no construction that was published or widely disseminated. These circumstances indicate that EPA, as an agency, had not formulated or articulated an authoritative interpretation of the term "use." Accordingly, the Fourth Circuit erred when it deferred to the voice of Region IV alone above the other competing voices.

B. The Interpretation Was Not Authoritative Because It Was Neither Published Nor Widely Disseminated By The Agency

Although this Court has not expressly held that only published agency interpretations are entitled to deference, various opinions reflect the importance of publication as an indication that the interpretation is authoritative; *i.e.*, that it represents the final and considered view of the agency, and not the views of individuals. *See, e.g., Ford Motor Credit,* 444 U.S. at 566-67; *Tallman,* 380 U.S. at 4; *Seminole Rock,* 325 U.S. at 417.[14]

There are strong policy reasons why this Court has looked to publication before giving deference. Publication provides some assurance that interpretations are authoritative agency interpretations, and that they are created with care and deliberateness. Moreover, the regulated community must be able to identify and to rely on the plain meaning of the regulations and authoritative, published constructions of those regulations when necessary. This is critical, because the community cannot comply with unknown requirements. Similarly, publication informs agency staff of agency interpretations and aids them in applying rules consistently, uniformly and fairly. *Cf. Morton v. Ruiz,* 415 U.S. 199, 232 (1974) (the publication requirement of the Administrative Procedure Act was designed to "avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.")[15] *See generally*, Man-

---

[14] Consistent with due process, certain lower courts have held that it is simply not proper to defer to unpublished agency interpretations of regulations. *See, e.g., Federal Labor Relations Auth. v. United States Dept. of Navy,* 966 F.2d 747, 762 (3d Cir. 1992).

[15] *Amici* are also concerned that the Region IV interpretation affects a substantive change to the meaning of the regulation. Agencies cannot rewrite regulations through reinterpretation. *See, e.g., United States v. Trident Seafoods Corp.,* 60 F.3d 556, 559 (9th Cir. 1995); *Director, Office of Workers' Compensation Programs v. Mangifest,* 826 F.2d 1318, 1324 (3d Cir. 1987); *Homemakers North*

ning, J., *Constitutional Structure and Judicial Deference To Agency Interpretations of Agency Rules,* 96 Colum. L. Rev. 612, 654-68 (April 1996).

III. THE FOURTH CIRCUIT'S DECISION NULLIFIES IMPORTANT CONSTITUTIONAL DUE PROCESS PROTECTIONS

The Due Process Clause of the Fifth Amendment requires that the Federal Government provide regulated entities with fair notice of regulatory interpretations affecting them. The Fourth Circuit erred in concluding that HCC received fair notice when it received a letter from EPA Region IV that conflicted with prior interpretations from EPA Region VI. The Fourth Circuit compounded this error when it allowed HCC only ninety days to comply with Region IV's interpretation, while regulated entities who had timely notice that they were subject to the regulation had the opportunity to obtain a two-year compliance waiver.

A. The Fourth Circuit Erred In Concluding That Conflicting Agency Interpretations Of A Regulation Provide Fair Notice

The Fourth Circuit correctly concluded that, prior to 1989, HCC had not received "fair notice" of Region IV's interpretation of the benzene NESHAP. The court found that HCC's understanding of the exemption was reasonable, that five years earlier, HCC had received a different interpretation of the exemption with respect to its similar plants in Texas (located in EPA Region VI) from Region VI and the Texas Air Control Board

---

Shore, Inc. v. Bowen, 832 F.2d 408, 412-13 (7th Cir. 1987). Stated another way, if EPA wants to change its benzene NESHAP regulation, it must follow notice and comment rulemaking. *See National Family Planning and Reproductive Health Ass'n, Inc. v. Sullivan,* 979 F.2d 227, 234 (D.C. Cir. 1992).

("TACB"),[16] and that Region VI had not objected to an exemption and waiver granted to HCC's Texas plants by the TACB based on the Region VI and TACB interpretations. (Pet. App. at 17a-18a.)

But, the Fourth Circuit erroneously concluded that the 1989 Region IV letter provided HCC with "actual notice" of the EPA's interpretation of the exemption. The Fourth Circuit reasoned that, notwithstanding that HCC had received conflicting interpretations of the exemption, because Region IV had enforcement authority over the Celriver Plant, Region IV's interpretation was the "authoritative interpretation" for Celriver. (Pet. App. at 23a-24a.)

Although Region IV's 1989 letter made HCC aware that Regions IV and VI interpreted the NESHAP exemption requirement differently, those letters did not resolve which of these two interpretations was authoritative. From HCC's perspective, there was no reason to believe that Region IV's interpretation was more authoritative than the longstanding interpretation of Region VI. In fact, the Region IV letter indicated that its interpretation was "based upon" agency memoranda from the same period as the interpretations Petitioner previously received from Region VI and the TACB. (Pet. App. at 66a.)

Where different EPA regional offices disagree as to the proper interpretation of a regulation, it would be unfair to conclude that HCC or any other member of the regulated community could reasonably ascertain which interpretation is authoritative. *Cf. Rollins Envtl. Serv. (NJ), Inc. v. EPA*, 937 F.2d 649, 653 (D.C. Cir. 1991). Stated another way, the law cannot require the regulated community to reach a conclusion as to which regional interpretation is correct.

---

[16] The TACB was authorized by EPA to administer the benzene NESHAP in Texas, and had consulted with Region VI before providing its interpretation of the NESHAP exemption to HCC. (Pet. App. at 64a n.19.)

Indeed, it is contrary to EPA policy to interpret nationally applicable rules, such as the benzene NESHAP (a *National* Emission Standard for Hazardous Air Pollutants), differently in different EPA regions. EPA has promulgated regulations to avoid just this result:

> It is EPA's policy to . . . [a]ssure fair and uniform application by all Regional Offices of the criteria, procedures and policies employed in implementing and enforcing the [Clean Air A]ct.

40 C.F.R. § 56.3(a) (1997).

Accordingly, HCC's knowledge of conflicting "authoritative" interpretations from other regions, and states with delegated federal programs, effectively precluded HCC from knowing with "ascertainable certainty" what its obligations were under the benzene NESHAP. *See General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

B. The Fourth Circuit's Ruling Denies Petitioner A Reasonable Opportunity To Comply

Inherent in the idea of requiring fair notice before imposing sanctions is the principle that the person must be given a reasonable opportunity to meet the requirement. It is not enough that it receive absolution from any liability for relevant pre-notice conduct. As this Court explained in *Grayned v. City of Rockford*, 408 U.S. 104 (1972),

> because we assume that man is free to steer clear between lawful and unlawful conduct, we insist that laws give persons of ordinary intelligence *a reasonable opportunity* to know what is prohibited *so that he may act accordingly*.

Id. at 108 (emphasis added).

The Fourth Circuit did not give HCC a reasonable opportunity to "steer clear of unlawful conduct" once it received notice of the Region IV interpretation. HCC was

neither allowed a meaningful opportunity to comply, nor given the opportunity to obtain the two-year compliance waiver available to other regulated entities.

If HCC had received timely notice of the agency interpretation of the NESHAP exemption, it would have had the opportunity that all other regulated entities had to obtain a two-year compliance waiver for purposes of installing the necessary equipment and undertaking the other actions necessary to meet the varied requirements of the benzene NESHAP.[17] But, by the time HCC received the Region IV letter in 1989, the period to apply for a waiver had been closed for nearly five years. *See* 40 C.F.R. § 61.11 (affected sources had 90 days from the effective date of the rule, June 6, 1984, to apply).

If it had received timely notice, HCC contends, and the District Court concluded, it would likely have received such a waiver for its Celriver plant. (Pet. at 25 & n.21; Pet. App. at 70a.) Because the Agency's serious due process violation caused HCC to lose its opportunity to obtain a waiver, HCC must be given at least the same opportunity —*i.e.*, two years—as other similarly situated persons.[18]

---

[17] Congress intended that existing facilities should have up to two years to come into compliance where necessary. *See* H.R. Conf. Rep. No. 91-1783, *reprinted in* 1970 U.S.C.C.A.N. 5374, at 5379 (1970).

[18] *See, e.g., Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987); *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1364 (D.C. Cir. 1993).

CONCLUSION

For the reasons set forth above, and for the reasons set forth in HCC's Petition, *Amici* respectfully request that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

PAUL G. WALLACH
Counsel of Record
WENDY E. ANDERSON
JAMES G. VOTAW
HALE AND DORR LLP
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 942-8400
Counsel for Amici Curiae

April 22, 1998

(4)

Supreme Court, U.S.
FILED
MAY 26 1998
CLERK

No. 97-1578

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

HOECHST CELANESE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ERNEST DAMAN, NATHAN H. HURT AND A. ALAN MOGHISSI IN SUPPORT OF PETITIONER

MARTIN S. KAUFMAN*
* COUNSEL OF RECORD
EDWIN L. LEWIS
DOUGLAS FOSTER

ATLANTIC LEGAL FOUNDATION
205 EAST 42ND STREET, 9TH FLOOR
NEW YORK, NY 10017
(212) 573-1960

COUNSEL FOR AMICUS CURIAE

17 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

INTRODUCTORY STATEMENT 1

INTEREST OF AMICI 3

REASONS FOR GRANTING THE WRIT

I. EPA'S MULTIPLE COUNTING INTERPRETATION IS INCONSISTENT WITH THE HISTORY OF THE RULEMAKING AND WITH THE MEANING OF THE CRITICAL TERMS AS UNDERSTOOD BY MEMBERS OF THE RELEVANT PROFESSIONS 6

II. JUDICIAL DEFERENCE TO THE AGENCY'S INTERPRETATION OF ITS RULE IS NOT REQUIRED OR APPROPRIATE WHERE THAT INTERPRETATION IS CONTRARY TO COMMON USAGE, HAS BEEN AMBIGUOUS OR INCONSISTENT AND WAS ADOPTED WITHOUT NOTICE AND COMMENT 8

A. EPA'S INTERPRETATION OF "USE" IS CONTRARY TO STANDARD USAGE, IS ARBITRARY AND SHOULD NOT BE ACCORDED DEFERENCE ... 8

B. EPA'S INTERPRETATION OF "USE" HAS NOT BEEN ADVANCED CONSISTENTLY AND SHOULD NOT BE ACCORDED DEFERENCE 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

Bowen v. Georgetown University Hospital, 488 U.S. 204, (1988) 13

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 10, 11, 13

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) 11

INS v. Cardoza-Fonesca, 480 U.S. 421 (1987) . 12, 13

Lyng v. Payne, 476 U.S. 926 (1986) 10

Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991) 10

Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Company, 463 U.S. 29 (1983) 11

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) 10, 11

Thomas Jefferson University v. Shalala, 512 U.S. 504 (1994) 10, 11

Udall v. Tallman, 380 U.S. 1 (1965) 10

United States v. Hoechst Celanese Corporation, 128 F.3d 216 (1997) 2, 7

Statutes and Regulations

Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* 10

Administrative Procedure Act, 5 U.S.C. § 706(2)(A) 10

40 C.F.R. Part 61, Subpart J . . . . . *passim*

40 C.F.R. § 61. 1 10(c)(2) 3, 6

40 C.F.R. § 61,342(a) (1997) 6

INTRODUCTORY STATEMENT

This brief is submitted in support of the petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit in *United States v. Hoechst Celanese Corporation*, 128 F.3d 216 (1997) (reproduced at Pet. App. la-33a)[1,2].

Amici are individuals who are members of the American Society of Mechanical Engineers. They have substantial experience in engineering and environmental regulatory compliance. They have frequently been required to interpret regulatory terms and standards in the environmental and engineering fields. They are dedicated to the idea that societal decisions must be based on the best available scientific information.

This case involves interpretation of a U.S. Environmental Protection Agency ("EPA" or "Agency") regulation entitled National Emission Standards for Equipment Leaks (Fugitive Emission Sources) of Benzene, 40 C.F.R. Part 61, Subpart J ("NESHAP" or the "benzene NESHAP").

The government's multiple counting method that is the basis for the government's position in the case is at odds with the common understanding and use by scientists and engineers of the pertinent terms. EPA's current position distorts the meaning of the regulation at issue, disregards the relevant rule-making background contained in the administrative record, and marks a change from the Agency's previous interpretation of the benzene NESHAP, Subpart 3 exemption at issue. When the interpretation of regulatory standards changes over time, and changes without opportunity for comment by social, professional or commercial groups affected, stability and predictability are

---

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici curiae* or their counsel.

defeated, and it is no longer possible to rely on the previously accepted meaning of terms in a regulation and to determine the action or forbearance needed to comply with the regulations. These concerns affect not only this case, but – given the broad reach of government regulations – will affect not only *amici* and their professional colleagues who are frequently called upon to interpret regulatory standards, but corporations and individuals as well who are the subject of regulation.

Amici submit that the decision of the court of appeals was incorrect insofar as that court deferred to EPA and upheld the Agency's interpretation of the word "use" in 40 C.F.R. § 61. 1 10(c)(2). *Amici* also submit that the court of appeals incorrectly gave deference to the government's latter day definition of "use" notwithstanding the uncontroverted evidence that such a definition was inconsistent with use of that term in the relevant professional community.

Amici respectfully urge the Court to grant the petition for a write of certiorari.

INTEREST OF *AMICI*

As noted above, *amici* are scientists and engineers, active in their professional organizations. Two of them are past presidents of the American Society of Mechanical Engineers (ASME)[3], and the third is currently chair of the Environmental Engineering Division of ASME. One of them was, in addition, a senior scientist with EPA. They have in their careers often been called upon to interpret regulations, particularly EPA regulations. They are familiar with the terminology of the regulation at issue as it applies to industrial processes and pollution control.

---

[3] *Amici* appear in this case only in their individual capacities, and do not purport to articulate the views of any organization to which they belong, except as explicitly set forth in the text.

Ernest L. Daman is Chairman Emeritus of Foster Wheeler Development Corporation and he previously served as Chairman of the Board of Foster Wheeler Development Corporation and before that as Director of Research of that company. He also held the position of Senior Vice President at its parent company, FWC. He is a Past President of American Society of Mechanical Engineers. Mr. Daman was elected to the National Academy of Engineering. He is a member of the American Association for the Advancement of Science and Past Chairman of the American Association of Engineering Societies. He is a Fellow of the Institute of Energy (England). He served on several ASME committees as member or chairman. Ernest Daman is the author of numerous papers, and holds 18 patents. He was responsible for the design and development of a combined steam gas turbine plant, fluidized bed combustion, fast breeder reactor components, supercritical steam generators, environmental control processes, and advanced high-efficiency power generation systems. He received his B.M.E. from the Polytechnic Institute of Brooklyn.

Nathan R. Hurt is vice president of IDM Environmental Corp. Previously, he worked for Los Alamos Technical Associates and the Goodyear Tire and Rubber Company. He was president of the Goodyear Atomic Corporation, a subsidiary of Goodyear Tire. He is a mechanical engineer with 50 years of experience in the chemical and nuclear industries. Nathan Hurt is a recent Past President of the American Society of Mechanical Engineers. His chemical industry experience includes design, construction and plant management – primarily in vinyl monomers and copolymers, synthetic rubbers and resins, and polyesters. His nuclear industry experience consists of project management, facilities management, and marketing in uranium enrichment and weapons plants. He is currently a member of the Nuclear Engineering Advisory Board of Worcester Polytechnic Institute. He received his B.S. in Mechanical Engineering from the University of Colorado and he is a registered professional engineer in Ohio.

A. Alan Moghissi is President of the Institute for Regulatory Science (RSI), a non-profit organization dedicated to the idea that societal decisions must be based on the best available scientific information. The activities of the Institute include research, scientific assessment, and science education at all levels-particularly the education of minorities. Dr. Moghissi held positions at the U.S. Public Health Service and, upon its formation, the U.S. Environmental Protection Agency (EPA). He served in a number of capacities at EPA, including Director of the Bioenvironmental/Radiological Research Division; Principal Science Advisor for Radiation and Hazardous Materials; and Manager of the Health and Environmental Risk Analysis Program. After his retirement from the EPA, Dr. Moghissi joined the University of Maryland at Baltimore as Assistant Vice President for Environmental Health and Safety; subsequently he was Associate Vice President for Environmental Health and Safety at Temple University in Philadelphia, Pennsylvania. He has been a visiting professor at Georgia Tech and at the University of Virginia. Dr. Moghissi's research has dealt with diverse subjects, ranging from measurement of pollutants to the biological effects of environmental agents. A major segment of his research has been on scientific information upon which laws, regulations, and judicial decisions are based -- notably risk assessment. He has published over 300 papers and several books. He is the editor-in-chief of *Environment International* and of *Technology: Journal of The Franklin Institute,* which is one of America's oldest continuously published journals of science and technology. Dr. Moghissi is a member of the editorial board of several other scientific journals. He is chairman of the Environmental Division of the American Society of Mechanical Engineers. Dr. Moghissi received his education at the University of Zurich, in Switzerland, and Technical University of Karlsruhe in Germany, from which he received a doctorate in physical chemistry.

REASONS FOR GRANTING THE WRIT

I. EPA's Multiple Counting Interpretation is Inconsistent with the History of the Rulemaking and with the Meaning of the Critical Terms as Understood by Members of the Relevant Professions

The legal issue underlying this case is whether the company's Celriver, South Carolina chemical manufacturing plant qualified for an exemption from an EPA regulation available for "[a]ny equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year." 40 C.F.R. § 61,1 10(c)(2). The exemption was intended to reach plants that collectively represented only one-half of the one percent of benzene emissions and thus were not cost-effective to regulate. Pet. App. 4a.

The court of appeals deferred to an interpretation that EPA has itself described (in a closely related benzene regulation) as the "multiple counting" approach. *See* 40 C.F.R. § 61,342(a) (1997) (Pet. App. 173a). In deferring to that interpretation the court of appeals rejected the interpretation frequently expressed over the years by EPA itself[4], state environmental regulatory agencies and in the unrebutted testimony of scientific and engineering experts that "use" in the context here relevant means "consumption" (referred to by the district court as "the single counting approach").

Use of terms that have a common (mutual) understanding by both regulators and the regulated community (and its advisors) is critical to accomplishing the purpose of a regulation. This is not to say that regulations cannot change over time, but when they are

---

[4] *See* Affidavit of Robert L. Ajax, Def. Exh, 18, ¶ 5, Pet. App. ___. As Mr. Ajax explained, a "determination based on nameplate capacity cannot be reconciled with multiple counting based on recycle." *Id.* Mr. Ajax concluded that any claim by DOJ that EPA attempted to promulgate a multiple-counting approach would be "plain wrong." Id.

changed, the usual administrative procedures, affording notice of the proposed changes and opportunity for comment, should be followed to protect the rights of the regulated. The circuit court's decision in this case, deferring to EPA's "multiple counting" approach to defining "use," disregards the common understanding of that word as scientists and engineers employ it.

By adopting a definition which derives the amount of benzene "used" by the Celriver Plant over the course of a year by counting the same benzene molecules over and over again, the government argued, and the Fourth Circuit agreed, that the Celriver Plant "uses" 2.59 million megagrams of benzene per year, and thus is not entitled to an exemption. *See* Pet. App. 5a. The exemption applies to a "plant site" designed to "produce or use" less than 1,000 megagrams of benzene annually.

Some government regulators considering this question reached contrary conclusions, noting that Hoechst "has successfully reduced the consumption of benzene to less than 1000 Mg per year and thus is exempt from the standards" of the benzene NESHAP.[5] EPA's regional offices disagreed on how to interpret the benzene NESHAP exemption. *See* Pet. App. 28a, *United States v. Hoechst Celanese Corporation*, 128 F.3d 216 (1997) The EPA bureaucracy "could not itself agree on the proper reading of its own regulation.")(dissenting opinion).

If the regulatory process is to function properly, in particular in matters of engineering and scientific technology such as involved in this case, the regulated community must be able to rely on the accepted, commonly understood meaning of the terms that underpin the regulatory standards. Significantly different interpretation by a regulatory agency of terms that have a commonly understood meaning in the relevant professional or business

---

[5] *See* Def. Exh. 64, Compliance Monitoring Report, Dr. George Marusak, EPA Region IV, December 9, 1986). The same EPA engineer later testified that he had never heard of the multiple-count approach to benzene "until told by counsel" in connection with this litigation. *See* Marusak Dep., Def. Exh. 32, at 170-72.]

communities should be considered arbitrary unless the agency can justify its interpretation by showing that its own definition is based on recognized scientific principles and furthers the legislative purpose of the relevant statute[6].

II. Judicial Deference to The Agency's Interpretation of Its Rule Is Not Required or Appropriate Where That Interpretation Is Contrary to Common Usage, Has Been Ambiguous or Inconsistent and Was Adopted Without Notice and Comment.

Amici also urge the Court to examine the proper boundaries for judicial deference to agency regulatory interpretations. The deference that the Fourth Circuit afforded EPA's interpretation of "use" is inappropriate in circumstances such as those present in this case.

A. EPA's Interpretation of "Use" is Contrary to Standard Usage, is Arbitrary and Should Not Be Accorded Deference.

EPA, in choosing to define "use" by using a multiple counting method, disregards the well-understood principle used by scientists and engineers that recirculating flows are not the same as "throughput." The example used by Dr. E. Bruce Naumann, one of Hoechst's experts (whose testimony was unrebutted) of recirculating coolant in an automobile engine is clear:

---

[6] While EPA may be entitled to depart substantially from a commonly accepted meaning, as EPA has done here, in order to achieve a policy goal articulated in legislation, the rulemaking process must give the regulated community notice of the agency's departure and an opportunity to convince the agency why its unusual interpretation is incorrect or not in furtherance of legislative purposes. EPA did not do so with respect to its interpretation unilaterally imposed long after the regulations were published and after this litigation began.

> The coolant or antifreeze is recycled through the system when the automobile operates. At the end of the year, the automobile may require the addition of some antifreeze to maintain a full cooling system. The cooling system would be considered to have "used" antifreeze during the year equivalent to the amount...added to the system. Under generally accepted chemical engineering principles, the molecules of antifreeze would not be recounted multiple times as they are recycled in the cooling system to calculate a "use" number. Otherwise, the cooling system would be considered to have "used" tens of thousands of gallons of antifreeze over the course of the year[7].

Dr. James Wei, Dean of the School of Engineering at Princeton University, and another unrebutted expert witness for Hoechst, stated even more critically of EPA's approach:

> The term "throughput" is ordinarily taken to mean overall net production or consumption, not internal circulation rate. The interpretation that "throughput is intended to mean total cumulative flow through equipment in benzene service rather than net consumption or usage, found in EPA's June 13, 1989 letter to the Celriver plant[8] demonstrates a surprising ignorance of commonly accepted concepts and practices in chemical engineering.[9]

---

[7] Def. Exh. 36, Initial Report of Dr. E. Bruce Naumann, at 3.

[8] Pet. App. 20a.

[9] Def. Ex. 40, Initial Report of James Wei, at 2. Emphasis supplied.

In other words, engineers and other scientists understand "used" in the context of a recirculating catalyst acting as a "reflux agent" (as at the Celriver plant) to mean the amount needed to "top off" the system. That amount is much more relevant to the purpose of the statute and the regulations, for that is the potential amount actually escaping into the environment. This amount can be measured directly and accurately, without the need for a "proxy" such as total quantity in circulation measured at numerous points.

Dean Wei's comment that the EPA interpretation "demonstrates" a surprising ignorance of accepted concepts and practices in chemical engineering" is significant because it compels the conclusion that EPA's interpretation is not based on "expertise" and is arbitrary.

But, even regulations adopted pursuant to an explicit statutory delegation are not given controlling weight if they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (*"Chevron"*). The Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, commands reviewing courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

While a court must give substantial deference to an agency's interpretation of its own regulations, *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144 (1991); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Udall v. Tallman*, 380 U.S. 1 (1965), it need not do so if the interpretation is "arbitrary."

This Court has also held that deference is even more warranted when the regulation concerns "a complex and highly technical regulatory program," which requires significant expertise and entail the exercise of judgment grounded in policy concerns, *Pauley v. BethEnergy Mines*, Inc., 501 U.S. 680, 697 (1991). We respectfully submit, however, that when the interpretation discloses ignorance of

accepted usage in the regulated field, as is the case here, the agency's "expertise" is called into question and the reviewing court should undertake an examination of the issue, rather than merely defer to the administrative agency.

However, to avoid converting "deference" to abdication of the judiciary's ultimate power of judicial review, the courts should accept only those agency interpretations "that are reasonable in light of the principles of construction courts normally employ," (*see* Scalia, J., concurring in part and concurring in the judgment, in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 260 (1991)) including common usage. When the agency fails to consider an important aspect of the problem, or has offered an explanation that is contradicted by the evidence before the agency, or "is so implausible that it could not be ascribed to. . .the product of agency expertise," *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Company*, 463 U.S. 29, 43 (1983), the courts owe no deference to the agency's interpretation. We submit that there was no record evidence to support EPA's interpretation of "use" advanced in this litigation because there was no opportunity for public comment. We do know that two experts, with whom *amici* concur, found that EPA's position was based on ignorance, wilful or otherwise, of practice and scholarship in the relevant fields.

As Justice Thomas noted in his dissent in *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 525 (1994), by affirming EPA's adoption of a definition at odds with the commonly understood usage, the courts disserve "the very purpose behind the delegation of lawmaking power to administrative agencies, which is to resolve. . . ambiguity in a statutory text. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991). *See also Chevron*, 467 U.S. 837, 865-866 (1984)."

EPA's interpretation of "use" also runs counter to the purpose of many federal environmental laws and programs which are designed to induce industry and the public to recycle. The EPA's approach to measuring benzene use destroys any incentive to recycle that substance because it provides no reward for recycling hazardous materials to minimize environmental exposure to such chemicals.

B. EPA's Interpretation of "Use" Has Not Been Advanced Consistently and Should Not Be Accorded Deference.

EPA has never set out a reasoned basis for its interpretation of the 1984 benzene NESHAP. It did not develop that interpretation through notice and comment rulemaking. Instead, E.P.A.'s interpretation of the Subpart J exemption has changed many times and differed from one EPA region to another.[10] EPA's current interpretation of "use" is far from obvious; indeed it is contrary to the common usage of the term, and it was developed without the procedural protections of notice and comment rulemaking. In such circumstances, judicial deference is not only inappropriate, it is an abdication of the critical role of the federal courts in judicial review of agency action.

An agency's interpretation of its own regulation is not entitled to deference from a reviewing court unless the same interpretation has been advanced consistently. *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987). Here, not only did EPA Regions 4 and 6 differ in their respective interpretations of the exemption from the benzene NESHAP, but EPA changed its mind about what "use" meant after completion of the rulemaking process and during the course of implementing the rule. As the dissent in the court of appeals noted, the agency "had at least three different approaches for measuring use: (1) consumption of benzene in a year, (2) the throughput of benzene through a plant for a year, and (3) the total quantity in use at the plant." Pet. App. 32a. Although an agency's interpretation of its own regulations is generally entitled to judicial deference, *Pauley v. BethEnergy Mines, Inc.*, 501 U.S.

---

[10] In the preamble to the 1984 rule, EPA's Administrator equated "use" with benzene "consumed" or "on hand." Hoechst relied on this interpretation, a "natural reading" of the regulation, Pet. App. 29a, in concluding that its Celriver plant was exempt. In addition, when Hoechst sought interpretation from regulators regarding two of Hoechst's plants in Texas, state regulators and EPA Region 6 confirmed that "use" refers to consumption or inventory. It was only later that EPA Region 4 decided that "use" is determined by recounting the same benzene each time it circulates through a plant.

680,698 (1991); *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 866 (1984) (*"Chevron"*), "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views, " *Pauley*, 501 U.S. at 698. *See also Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988); *INS v. Cardoza-Fonseca*, 480 U.S. at 446, n. 30 ("an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view') (citation omitted).

From a scientific or engineering perspective, there is no basis for according deference to the EPA's interpretation of "use" in the circumstances of this case. When an agency adopts multiple positions on central issues in a rulemaking -- such as the meaning of the term "use" -- the persons regulated and their scientific and engineering advisors cannot rely on the plain meaning of regulatory terms and cannot conform their actions or their advice to the requirements of the law. Deference to the agency is not due in a case like this where the agency has not articulated an authoritative and considered interpretation of its rule but has instead been inconsistent and ambiguous and avoided important procedural protections. *Amici* submit that the Court should grant the petition for a writ of certiorari in order to address the serious precedential impact of the decision below[11].

---

[11] We do not suggest that regulatory agencies must never change their rules or their interpretations, and we concede that an agency "must have ample latitude to 'adopt their rules and policies to the demands of changing circumstances.'" *See Motor Vehicle Manufacturers Association v. State Farm Mutual*, 463 U.S. 29, 41 (1983), quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Dated: May, 1998

Respectfully submitted,

Atlantic Legal Foundation, Inc.

By: _____

Martin S. Kaufman*
Edwin L. Lewis
Douglas Foster

205 East 42nd Street (9th Fl.)
New York, NY 10017
(212) 573-1960

Counsel for amici

*Counsel of Record

Supreme Court, U.S.
FILED
MAY 26 1998
CLERK

No. 97-1578

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief Amici Curiae
of the
AMERICAN INSTITUTE OF CHEMICAL ENGINEERS, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, NUCLEAR ENERGY INSTITUTE, SCIENCE & ENVIRONMENTAL POLICY PROJECT, INC., SOCIETY OF PLASTICS ENGINEERS and TEXAS INSTITUTE FOR ADVANCEMENT OF CHEMICAL TECHNOLOGY, INC.
joined by the
CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY, MANUFACTURERS AND CHEMICAL INDUSTRY COUNCIL OF NORTH CAROLINA, NORTH CAROLINA CITIZENS FOR BUSINESS AND INDUSTRY, SOUTH CAROLINA CHAMBER OF COMMERCE, SOUTH CAROLINA MANUFACTURERS ALLIANCE and VIRGINIA MANUFACTURERS ASSOCIATION
IN SUPPORT OF PETITIONER

SCOTT M. DUBOFF
Counsel of Record
SAÔNE BARON CROCKER
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amici Curiae American Institute of Chemical Engineers, et al.

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 2

STATEMENT OF INTEREST OF *AMICI* 4

REASONS FOR GRANTING THE WRIT 8

I. EPA's Multiple Counting Interpretation Jettisons The Administrative Record And The Accepted Meaning Of The Engineering And Scientific Terms At Issue 8

II. EPA's Approach Is Unexplained And Unworkable 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **Page(s)**

INS v. Cardoza-Fonesca, 480 U.S. 421 (1987) 12
Jersey Central Power & Light Co. v. FERC, 730 F.2d 816 (D.C. Cir. 1984) 12
Diamond Roofing co: v. OSHRC, 528 F.2d 645 (5th Cir. 1976) 3,14-15

FEDERAL STATUTES

Clean Air Act, 42 U.S.C. § 7412 2

REGULATIONS

40 C.F.R. Part 61, Subpart J 2
40 C.F.R. Part 61, Subpart FF 14
40 C.F.R. § 61.110(c)(2) 8
40 C.F.R. § 61.342(a) 8
40 C.F.R. § 61.355(k)(1)-(2) 14
40 C.F.R. § 72.2 11
40 C.F.R. Part 112, Appendix E 11
57 Fed. Reg. 8017 (1992) 14
58 Fed. Reg. 3072 (1993) 14

MISCELLANEOUS

U.S. International Trade Commission, *Synthetic Organic Chemicals, United States Production and Sales, 1990*, USITC Publication 2470 (December 1991) 9

No. 97-1578

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief Amici Curiae

of the

AMERICAN INSTITUTE OF CHEMICAL ENGINEERS, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, NUCLEAR ENERGY INSTITUTE, SCIENCE & ENVIRONMENTAL POLICY PROJECT, INC., SOCIETY OF PLASTICS ENGINEERS and TEXAS INSTITUTE FOR ADVANCEMENT OF CHEMICAL TECHNOLOGY, INC.

joined by the

CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY, MANUFACTURERS AND CHEMICAL INDUSTRY COUNCIL OF NORTH CAROLINA, NORTH CAROLINA CITIZENS FOR BUSINESS AND INDUSTRY, SOUTH CAROLINA CHAMBER OF COMMERCE, SOUTH CAROLINA MANUFACTURERS ALLIANCE and VIRGINIA MANUFACTURERS ASSOCIATION

IN SUPPORT OF PETITIONER

This brief *amici curiae* of the American Institute of Chemical Engineers, *et al.*, is submitted in support of the petition for a writ of certiorari filed by Hoechst Celanese Corporation (HCC).[1] The petition seeks review of the

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the amici curiae and their members are

judgment and opinion of the United States Court of Appeals for the Fourth Circuit in *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (1997) (reproduced at Pet. App. 1a-33a).

INTRODUCTION

Amici American Institute of Chemical Engineers, *et. al.*, include a number of nonprofit scientific and engineering organizations representing a broad cross section of those professions. In the conduct of their professional responsibilities, *amici* and their members are frequently required to interpret regulatory terms and standards. They cannot meet that responsibility unless regulatory requirements are stated clearly and the terms used are given their plain and natural meaning. *Amici* share a common concern which is also the focus of HCC's petition and fundamental to achieving the purposes underlying a broad range of regulatory standards that govern scores of industries: the ability of the regulated community to rely on the customary, natural meaning of the terms used in regulations when determining the obligations that arise under those regulations.

In addressing these critical concerns the scientific and engineering organization *amici* are joined by state-based manufacturing and business associations (also nonprofit). Those associations include thousands of members in the engineering and scientific professions.

More specifically, HCC's petition involves interpretation of a U.S. Environmental Protection Agency ("EPA" or "Agency") regulation, National Emission Standard for Equipment Leaks (Fugitive Emission Sources) of Benzene, 40 C.F.R. Part 61, Subpart J ("NESHAP" or "benzene NESHAP"). Pet. App. 123a-24a (the regulation was adopted pursuant to § 112 of the Clean Air Act, 42 U.S.C. § 7412). The issue presented concerns the meaning of the exemption from the benzene NESHAP that is

---

contributing monetarily to the preparation or submission of this brief. The petitioner and respondent have each consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

provided in 40 C.F.R. § 61.110(c)(2) for facilities that "produce or use less than 1,000 megagrams of benzene per year." Pet. App. 124a. The federal government's litigation position in the case, which the Fourth Circuit validated, employed a "multiple counting" approach to determine the quantity of benzene that a facility "produced or used" and implement the exemption in section 61.110(c)(2). As *amici* explain below, that "multiple counting" approach distorts the text of the regulation, disregards the pertinent regulatory background in the administrative record, and deviates from the Agency's previous interpretation of the benzene NESHAP. Moreover, EPA's position is directly at odds with the above-described necessity for use of commonly understood terminology by scientists and engineers. Indeed, even the Department of Justice (EPA's counsel) felt constrained to acknowledge (to the trial court) that the benzene NESHAP exemption regulation's failure to employ terms that conveyed the meaning EPA intended was "a mistake" and "an accident." J.A. 000065, 000073[2]; *see also Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976) ("a regulation cannot be construed to mean what an agency intended but did not adequately express").

The consequence for the regulated community is the inability to rely on the previously accepted meaning of regulatory terms or to determine the measures needed to comply with regulatory standards. These concerns transcend this case and will adversely affect *amici* and their members as well as other scientific and engineering professionals who are frequently called upon to interpret regulatory standards in many contexts. Accordingly, *amici* submit that the decision of the court of appeals was incorrect insofar as that court deferred to EPA and upheld the Agency's interpretation of the regulation. To address these matters, *amici* respectfully urge the Court to grant the petition for a writ of certiorari.

---

[2] References herein to portions of the record that are not included in the Appendix to the petition but were reproduced in the Joint Appendix before the court of appeals are abbreviated as "J.A. ____."

STATEMENT OF INTEREST OF *AMICI*

As noted above, a number of the *amici* are nonprofit scientific and engineering organizations representing a broad cross section of those professions.

Founded in 1908, *amicus* American Institute of Chemical Engineers (AIChE) is a membership organization providing leadership to the chemical engineering profession. Representing 58,000 members in industry, academia, and government, AIChE provides forums to advance the theory and practice of the profession, upholds high professional standards and ethics, and supports excellence in education.

Amicus National Society of Professional Engineers (NSPE) is a membership organization with 54 state and territorial societies, and over 500 local chapters representing the interests of approximately 60,000 licensed engineers in industry, government, education, construction and consulting practice in the United States. NSPE's mission is to promote the ethical, competent and licensed practice of engineering, and to enhance the professional, social and economic well-being of its members. NSPE represents its members before a variety of forums in connection with various matters of regulatory and public policy that affect the engineering profession.

Amicus Nuclear Energy Institute (NEI) is the organization responsible for establishing unified nuclear industry policy on matters affecting that industry, including a broad array of scientific, technological and regulatory issues. NEI's members include nuclear plant designers, major architect/engineering firms, all utilities licensed to operate commercial nuclear power plants in the United States, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

Amicus Science & Environmental Policy Project, Inc. (SEPP) is an organization of scientists concerned with informing the public policy forum with sound, factual analysis of critical scientific issues. Guided by an international Board of Science Advisors, SEPP sponsors international scientific

conferences and workshops, publishes policy analyses and critiques by panels of international experts, conducts surveys of specialists on various issues, and disseminates statements to the public and regulatory and legislative forums regarding key environmental policies.

Amicus Society of Plastics Engineers (SPE) consists of more than 35,000 individual plastics professionals located in 70 countries working in 92 local geographical Sections. SPE's members range from corporate presidents to college students, and they are involved in all facets of plastics manufacturing technology and utilization. The Society's objective is the education of its members and promoting knowledge and education regarding plastics and polymers worldwide. This is accomplished through SPE's 20 technical divisions as well as conferences, seminars, technical publications and monthly local Section meetings.

Amicus Texas Institute for Advancement of Chemical Technology, Inc. (TIACT) is concerned with a broad array of scientific and regulatory issues. A principal TIACT objective is the advancement of chemical technology through a better informed public. TIACT achieves that objective through study, evaluation and public dialogue regarding a variety of topics concerned with chemical technology, human health and the environment. TIACT's studies have included chemicals and the causes of cancer, safety in the workplace, assessment of the impact of chlorine on human health and the environment, epidemiological studies of cancer in Texas, hormesis studies (hormesis is the property of a chemical, such as a medicine, to be toxic at high dosages and therapeutic at low dosages), hazardous waste incineration and the twenty-first century work force requirements projected for the chemical and petroleum refining industries. TIACT is headquartered at Texas A&M University in College Station, Texas.

As noted, the serious scientific and engineering concerns raised by the above-described *amici* are also shared by a number of state-based manufacturing and business associations

whose members include thousands of engineering and scientific professionals.

Amicus Chemical Industry Council of New Jersey (CIC/NJ) is a membership association of 105 manufacturers in the chemical process industry with facilities located throughout the state. CIC/NJ coordinates policy for the industry on a variety of matters, including regulatory affairs, education, communications and environmental awareness and protection. CIC/NJ members employ over 104,000 people in New Jersey and produce a variety of materials used in agriculture, manufacturing, construction, mining, textiles, cosmetics and food processing.

Amicus Manufacturers and Chemical Industry Council of North Carolina (MCIC) represents 70 companies and more than 125 industrial facilities in North Carolina. A fundamental objective of MCIC is promotion of sound science, engineering and economics in the legislative and regulatory process. MCIC members employ more than 75,000 North Carolinians engaged in manufacturing a broad range of products. MCIC works in conjunction with state and federal regulatory agencies to provide leadership, information and services in the development of policy, law and regulations regarding the manufacture, use and proper handling of chemicals for the protection of public health and the environment.

Founded in 1942, *amicus* North Carolina Citizens for Business and Industry (NCCBI) is a research organization specializing in public policy and related issues affecting manufacturing and business. With more than 1,800 members, NCCBI is the largest organization of its type in North Carolina. Representing a diverse cross section of the economy, NCCBI's members range in size from small businesses to major corporations, as well as community colleges, universities and allied organizations. NCCBI advocates sound fiscal policies by federal, state and local government, and supports initiatives that will maintain an environmentally sound and diversified economy.

Founded in 1940, *amicus* South Carolina Chamber of Commerce is the state's largest broad-based business and trade association. Operating as a statewide organization, the South Carolina Chamber represents businesses, industries, professions and associations of all sizes and types. The Chamber serves as a forum for consensus building to facilitate presentation of a unified viewpoint in a broad range of public policy and regulatory matters before legislative, regulatory and judicial forums.

Amicus South Carolina Manufacturers Alliance (SCMA) represents more than 80 companies and over 140 industrial facilities in South Carolina. In addition, SCMA members employ more than 80,000 South Carolinians in the manufacture of a wide variety of products. SCMA works closely with state and federal regulatory agencies to provide information, guidance and leadership in the development of laws, regulations and policies regarding environmental protection in South Carolina. SCMA's very active environmental committee consists of the state's leading scientists and engineers, who have responsibility for environmental management and compliance at their respective companies. SCMA promotes sound engineering, science and economics in both the legislative and regulatory processes.

Amicus Virginia Manufacturers Association (VMA) represents approximately 500 manufacturing industries in Virginia. VMA's Environmental Affairs Committee is composed of over 80 active members and seven subcommittees which monitor and submit comments on virtually all regulatory, legislative and judicial matters concerning state government regulation of the environment in Virginia, as well as federal matters of particular concern to VMA members, such as this case. The members of VMA's Environmental Affairs Committee are engineers and scientists that have primary responsibility for environmental management and compliance at their industrial facilities.

REASONS FOR GRANTING THE WRIT

I. EPA's Multiple Counting Interpretation Jettisons The Administrative Record And The Accepted Meaning Of The Engineering And Scientific Terms At Issue

The issue underlying HCC's petition is whether the company's Rock Hill, South Carolina chemical manufacturing plant ("the Celriver Plant") qualified for an exemption from the benzene NESHAP. The exemption is available for "[a]ny equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year." 40 C.F.R. § 61.110(c)(2); Pet. App. 124a. The exemption was intended to reach plants that, relatively speaking, were not cost-effective to regulate. Pet. App. 4a. The court of appeals deferred to an administrative interpretation that EPA has itself described (in a closely related benzene regulation) as the "multiple counting" approach. *See* 40 C.F.R. § 61.342(a); Pet. App. 173a. In deferring to that interpretation, the court of appeals rejected the interpretation frequently expressed over the years by EPA, state environmental agencies and others – including unrebutted testimony of scientific and engineering experts – that "use" means "consumption" (referred to by the district court as the "single counting" approach). *See, e.g.*, Pet. App. 42a.

At the outset it should be noted that shared vocabulary between regulators and the regulated community is critical both to accomplishing the purpose of a given regulation and preserving the rights of the regulated. The Fourth Circuit's decision in this case, however, by deferring to EPA's "multiple counting" approach to define "use," disregards the vocabulary on which scientists and engineers rely every day. Under the approach advocated by EPA, the amount of benzene "used" by the Celriver Plant over the course of a year is derived through counting the same benzene over and over again, with the result that the Celriver Plant "used" more than 2.5 million megagrams of benzene each year. *See* Pet. App. 21a, 66a. That contention leads to a very strange anomaly, inasmuch as the U.S. International Trade Commission reports that *total*

annual production (manufacturing) of benzene in the United States during the relevant period was only 5.64 million megagrams.[3] In other words, according to EPA, HCC's Celriver plant used nearly one-half of total annual U.S. production of benzene.

That contention is not credible and graphically demonstrates how EPA's approach disregards a fundamental concept that engineers and scientists frequently address, specifically, that recirculating flows are never to be confused with throughput. This is illustrated by the customary mental construct of a "black box." For every "black box" input by flow is equal to output by flow plus output by consumption or losses to the environment, such as fugitive emissions (the second component, output by consumption or losses to the environment, is synonymous with throughput). Unrebutted evidence submitted on behalf of HCC demonstrated this point:

> The term "throughput" is ordinarily taken to mean overall net production or consumption, not internal circulation rate. The interpretation that "throughput is intended to mean total cumulative flow through equipment in benzene service rather than net consumption or usage," found in EPA's June 13, 1989 letter to the Celriver Plant [*see* Pet. App. 20a], demonstrates a surprising ignorance of commonly accepted concepts and practices in chemical engineering. As a past President of the American Institute of Chemical Engineers, I am concerned that professionally competent members could pronounce such a radical interpretation without citing authorities and textbooks.

Pet. App. 189a-90a, Initial Report of Dr. James Wei (Professor of Chemical Engineering and Dean of Engineering, Princeton University). Another engineering expert similarly explained:

---

[3] See U.S. International Trade Commission, *Synthetic Organic Chemicals, United States Production and Sales, 1990*, USITC Publication 2470, at 2-2 (December, 1991).

> An automobile's cooling system is a simple example of a process unit analogous to a facility that recycles benzene internally. The coolant or antifreeze is recycled through the system when the automobile operates. At the end of a year, the automobile may require the addition of some antifreeze to maintain a full cooling system. The cooling system would be considered to have "used" antifreeze during the year equivalent to the amount purchased and added to the system. Under generally accepted chemical engineering principles, the molecules of antifreeze would not be recounted multiple times as they are recycled in the cooling system in order to calculate a "use" number. Otherwise, the cooling system would be considered to have "used" tens of thousands of gallons of antifreeze over the course of the year. These principles of chemical engineering apply equally to the calculation of benzene used in a facility that recycles benzene internally.

Pet. App. 176a-77a, Initial Report of Dr. E. Bruce Nauman (Professor of Chemical Engineering, The Isermann Department of Chemical Engineering, Rensselaer Polytechnic Institute).

As the court of appeals recognized, Pet. App. 4a, HCC's Celriver Plant used benzene as a catalyst or "reflux agent" that is continually recycled in the process of separating water and other compounds from acetic anhydride and acetic acid. The term "reflux agent" is well-understood by chemical engineers. It means that all benzene recirculates in the process – some directly and some through an impurity-removing mechanism. In this connection it bears emphasis that as EPA was developing the benzene NESHAP in the late 1970's, the Agency was clearly directing its attention to entities that either *produced* (manufactured) benzene or used benzene as a *feedstock*, rather than entities like HCC that employed benzene as a catalyst only. Although HCC's Celriver plant did not produce benzene or use it as a feedstock in any process, at the time of the underlying rulemaking there were many industrial facilities within both of those categories. In fact, when the

administrative record was being developed benzene producers and feedstock users represented 99.5% of the total benzene emissions from all sources.[4] On the other hand, for a myriad of non-producer/non-feedstock users, which included HCC's Celriver Plant (again, all such other uses represented only one-half of one percent of benzene emissions), EPA recognized that an exemption provision was necessary, and the exemption applied to a "plant site" designed to "produce or use" less than 1000 megagrams of benzene annually.

This context is quite important because it provides further confirmation that the focus of EPA's 1984 regulation was the benzene emissions of benzene producers and feedstock users, and that the term "use" in EPA's regulation meant "consumption."[5] Indeed, it is well-documented that numerous engineers, many of whom were employed by EPA and other air quality agencies, looked at the regulation and concluded that "use" meant consumption. For example, the head of the EPA bureau that developed the benzene NESHAP testified that it is "unequivocally clear" that "'internal recycle' – *i.e.*, multiple counting – was never 'considered [n]or suggested as the basis for the NESHAP exemption.'" *See* Pet. App. 61a (district court quoting affidavit of Robert Ajax). In case after case the government scientists and engineers looking at this matter reached similar conclusions, even to the extent of noting that

---

[4] See J.A. 000552, JRB Associates Inc., *Materials Balance for Benzene: Level II* (EPA-560/13-80-009, May 1980) (JRB Level II), Def. Exh. 5.

[5] EPA's Background Information Document (BID) for the benzene NESHAP, *see* J.A. 000243, *Benzene Fugitive Emissions – Background Information for Promulgated Standards*, EPA-450/3-80-032b, June 1982, Def. Exh. 10, underscores this point. The BID demonstrates that the 1,000 megagram cutoff in the benzene NESHAP exemption was based on "design production capacity" as represented by a facility's "nameplate" capacity. Production capacity – like nameplate capacity – is a "single count" concept to an engineer, as EPA has recognized in other rulemakings on subjects ranging from capacity to generate electricity to capacity to store oil. In those regulations, EPA uses the term "nameplate capacity" to describe measurement of the underlying subject matter at a fixed point in time. *See* 40 C.F.R. § 72.2 (acid rain program); 40 C.F.R. Part 112, App. E (oil pollution prevention).

HCC "has successfully reduced the consumption of benzene to less than 1000 Mg per year and thus is exempt from the standards" of the benzene NESHAP.[6]

It should also be emphasized that EPA's interpretation of the benzene NESHAP exemption has changed a number of times, especially in the face of litigation, and EPA's regional offices could not agree on how to interpret the regulation. Thus, when HCC sought interpretation from regulators regarding two of HCC's plants in Texas, state regulators and EPA Region 6 confirmed that "use" refers to consumption or inventory. It was only later that EPA Region 4 decided that "use" is determined by recounting the same benzene each time it circulates through a plant. *See* Pet. App. 28a, 32a (EPA bureaucracy "could not itself agree on the proper reading of its own regulation"; EPA "had at least three different approaches for measuring use: (1) consumption of benzene in a year, (2) the throughput of benzene through a plant for a year, and (3) the total quantity in use at the plant").[7]

This case is a poignant example of the administrative-regulatory process not working as it should. To be sure, EPA, like many federal regulatory agencies has a number of responsibilities and *amici* do not advocate a standard of precision beyond that which is reasonable to expect in such

---

[6] J.A. 001035, 001036, Def. Exh. 64, Compliance Monitoring Report, Dr. George Marusak, EPA Region IV, December 9, 1986. The same EPA engineer later testified that he had never heard of the "multiple count" approach to benzene "until told by counsel" in connection with this litigation. *See Memorandum in Support of Hoechst Celanese Corporation's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment*, Exh. 32, Deposition of George Marusak, at 170-72; *see also* Pet. App. 57a.

[7] Although an agency's interpretation of its own regulations is generally entitled to judicial deference, that is not true where, as in this case, the agency's interpretation has not been advanced consistently. *INS v. Cardoza-Fonesca*, 480 U.S. 421, 445-46 ns. 29 & 30 (1987). EPA's approach to the benzene NESHAP at issue here has been a "moving target", *see Jersey Central Power & Light Co. v. FERC*, 730 F.2d 816, 822 (D.C. Cir. 1984), rather than a policy to be accorded deference.

circumstances. But if the regulatory process is to function properly, including matters of engineering and scientific terminology such as in this case, the regulated community must be able to rely on the accepted, commonly understood meaning of the terms that comprise regulatory standards. If an agency intends to depart substantially from such commonly accepted meaning, as EPA has done here, the rulemaking process must alert the regulated community of the agency's departure. EPA failed to do so.

II. EPA's Approach Is Unexplained And Unworkable

Aside from being contrary to the accepted meaning of the term "use" and the administrative record, EPA provided no explanation as to how its "multiple counting" approach would be implemented in practice.

More specifically, at no time during the rulemaking for the 1984 benzene NESHAP, or during the intervening fourteen years, did EPA attempt to explain how one would answer the numerous questions that arise when a "multiple counting" approach is applied to even the most simple manufacturing process. For example, nowhere does EPA provide any explanation as to how one would select the individual pieces of equipment necessary to measure the recirculation rate or recycled quantity of benzene. Nor is there any guidance regarding chemical streams that split into substreams (some substreams will recycle their flow while others will not). Also absent is any guidance to address the fact that the different pieces of equipment through which benzene is routed in the manufacturing process may have different rates of flow and volume.[8] Without that information EPA's "multiple count"

---

[8] HCC submitted a trial exhibit (*Inconsistent Applications of the 1,000 Megagram NESHAP Exemption*, Revised Attachment H, J.A. 001369) documenting all known post-promulgation instances (during the years 1984-95) in which EPA or a state with EPA-delegated authority to implement the benzene NESHAP determined whether individual plants satisfied the exemption's 1,000 megagram limit. The exhibit shows that the term "use" was more frequently applied as a "single count" rather than "multiple count" concept. But the most significant aspect of the exhibit is the fact that in those instances where EPA applied "use" as a "multiple

approach is entirely arbitrary. It is unlikely that calculations by two qualified individuals, looking at the same facility and conditions, would agree on the amount of benzene "used".

These questions, which EPA has never answered, expose the unworkability of the "multiple count" approach which EPA claims is the basis of the benzene NESHAP exemption. Indeed, a subsequent NESHAP, 40 C.F.R. Part 61, Subpart FF, is powerful evidence that EPA would not have avoided addressing such questions if it had actually intended to adopt "multiple counting" in the Subpart J regulation at issue here. Importantly, the application of Subpart FF is based in part on benzene flow at multiple points within a plant. As a result, the preambles to the proposed and final Subpart FF rules, *unlike* their Subpart J counterparts, explain how one is to determine the location and number of points required to measure recycled volume. *See, e.g.*, 57 Fed. Reg. 8017, 8019-21 (1992); 58 Fed. Reg. 3072, 3076-77 (1993); 40 C.F.R. § 61.355(k)(1)-(2). The extensive analysis of this very issue in the Subpart FF rulemaking shows that calculating benzene use based on "multiple counting" is complex and requires explanation. Such explanation is critical to the scientists and engineers who must implement EPA's regulation, but was completely lacking in this case.

In short, EPA failed to articulate a considered and consistent interpretation of the benzene NESHAP exemption, and has instead been inconsistent and ambiguous and avoided important procedural protections to those who are subject to the rule. The scientific and engineering communities cannot do their jobs properly where they cannot rely on the plain meaning of regulatory terms. To strain the plain meaning of the benzene NESHAP, as EPA has advocated, can only serve "to delay the day" when such regulations will be written so that the regulated community "will be better able to understand and observe

---

count" concept the Agency failed to provide any explanation regarding how to determine the number and location of the internal points where benzene flow would be measured, or otherwise provide guidance that is essential to measuring benzene "use" on a "multiple count" basis.

them." *Diamond Roofing Co. v. OSHRC*, 528 F.2d at 650. *Amici* submit that the significance of these issues to a broad range of administrative agency matters and the serious precedential impact of the decision below merit review by this Court.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

SCOTT M. DUBOFF
Counsel of Record
SAÔNE BARON CROCKER
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W.
Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amici Curiae
American Institute of Chemical
Engineers, et al.

Dated: May 26, 1998

Supreme Court, U.S.
FILED
MAY 26 1998
OFFICE OF THE CLERK

(6)

No. 97-1578

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

HOECHST CELANESE CORPORATION,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE ANTIMICROBIAL TREATED ARTICLE COALITION IN SUPPORT OF PETITIONER

JOHN B. DUBECK*
DAVID G. SARVADI
THOMAS C. BERGER
KELLER AND HECKMAN LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100
Counsel for Amicus Curiae
*Counsel of Record

28 pp

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

QUESTION PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 2

A. *Hoechst* Is Not an Isolated Instance of an Illegal Agency Tactic; Federal Administrative Agencies Often Announce Substantive Changes in Regulatory Meaning Through Enforcement Proceedings Without Providing Fair Notice or Opportunity to Come Into Compliance 2

B. EPA's Most Recent Use of This Invalid Practice .. 3

1. The FIFRA Treated Article Exemption 3

2. *Lifetime Hoan* Is the Archetype of Illegal Use of the Enforcement Tool 8

C. EPA's Tactic Illegally Circumvents the APA and Regulatory Review Statutes 12

D. EPA's Illegal Use of the Enforcement Process Continues Today 14

E. Other Federal Agencies Use This Tactic 15

F. By Giving Undue Deference to Agency Enforcement Interpretations, Courts Are Promoting an Illegal Practice 18

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES:

Alaska v. Department of Transp., 868 F.2d 441(D.C. Cir. 1989) 16

Bellarno Int'l Ltd. v. FDA, 678 F. Supp. 410 (E.D.N.Y. 1988) 16

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 19

Central Hudson Gas & Electrical Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 15

Chamber of Commerce of the United States v. OSHA, 636 F.2d 464 (D.C. Cir. 1980) 16

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 18

CWM Chemical Servs., Inc., No. TSCA-PCS-91-0213 (EPA May 15, 1995) 13

Homemakers North Shore, Inc. v. Bowen, 832 F.2d 408 (7th Cir. 1987) 19

Jerri's Ceramic Arts, Inc., v. Consumer Prod. Safety Comm'n, 874 F.2d 205 (4th Cir. 1989) 16

Martin v. American Cyanamid Co., 5 F.3d 140 (6th Cir. 1993) 18

TABLE OF AUTHORITIES — Continued

Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991) 16

Prows v. United States Dept. of Justice, 704 F. Supp. 272 (D.D.C. 1988), *aff'd*, 938 F.2d 274 (D.C. Cir. 1991) 16

San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966 (9th Cir. 1989) 15

Secretary of Labor v. American Cyanamid Co., No. 86-681, 1992 WL 30659 at *1 (OSHRC Feb. 7, 1992) 18

Skidmore v. Swift & Co., 323 U.S. 134 (1944) ... 19

Southern Cal. Aerial Advertisers' Ass'n v. FAA, 881 F.2d 672 (9th Cir. 1989) 15

Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3d. Cir. 1969) 16

Udall v. Tallman, 380 U.S. 1 (1965) 18

United States v. Bioclinical Sys., Inc., 666 F. Supp. 82 (D. Md. 1987) 16

United States v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989) 15

TABLE OF AUTHORITIES -- Continued

FEDERAL STATUTES AND REGULATIONS:

29 C.F.R. § 1910.1200(f)(1) (1997) 17

40 C.F.R. § 152.25(a) (1997) ..... *passim*

Administrative Procedure Act, 5 U.S.C. §§ 551-596 (1994) ..... *passim*

Administrative Procedure Act, 5 U.S.C. § 551(4) (1994) 14

Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994) 3

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994) ..... *passim*

Federal Insecticide, Fungicide, and Rodenticide Act § 13(a), 7 U.S.C. § 136k(a) (1994) 6

Federal Insecticide, Fungicide, and Rodenticide Act § 25(b), 7 U.S.C. § 136w(b) (1994) 4

Federal Insecticide, Fungicide, and Rodenticide Act § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A) (1994). 10

Paperwork Reduction Act , 44 U.S.C. §§ 3501-3520 (1994) 14

TABLE OF AUTHORITIES — Continued

Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 111 Stat. 2592 14

FEDERAL REGISTER:

63 Fed. Reg. 19,256 (April 17, 1998) 7, 14, 15

OTHER AUTHORITIES:

Charles M. Chadd & Jerome K. Bowman, *Agencies' Enforcement of Ambiguous Regulations Don't Deserve Judicial Deference* (Washington Legal Found., Critical Legal Studies, Working Papers Series No. 84, 1988) ... 19

Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (October 4, 1993) 14

In re Hasbro, Inc., No. FIFRA 97-H-06, Consent Agreement and Consent Order (EPA Apr. 22, 1997) 9

In re Lifetime Hoan Corp., No. FIFRA 98-H-04, Consent Agreement and Consent Order (EPA Feb. 13, 1998) 10, 11

In re Minnesota Mining and Manufacturing Company, No. 5-FIFRA-97-027, Consent Agreement and Consent Order (EPA Sept. 29, 1997) 9

TABLE OF AUTHORITIES — Continued

OSHA Compliance Instruction (CPL), *CPL 2-2.38C, Inspection Procedures for the Hazard Communication Standard, 29 C.F.R. 1910.1200, 1915.99, 1917.28, 1918.90, 1926.59, 1928.21* (Oct. 1990) 17

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like-- Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311 (1992) 13, 15

U.S. Environmental Protection Agency, Press Release, *EPA Acts to Prevent Playschool Toy Manufacturer Hasbro, Inc., From False Claims About Protecting Children from Microbial Infections* (Apr. 18, 1997) 12

The Antimicrobial Treated Article Coalition (Coalition) respectfully submits this brief *amicus curiae* in support of petitioner.[1/] The written consents of all parties have been filed with the Clerk of the Court, pursuant to Rule 37.2.(a).

INTEREST OF AMICUS CURIAE

The Coalition is an unincorporated consortium of ten companies that (1) produce finished goods containing preservatives registered as pesticides by the U.S. Environmental Protection Agency (EPA) under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y (1994); or (2) produce the pesticides used as preservatives in such finished goods. As described below, a new Agency interpretation of an exemption applicable to antimicrobial treated articles announced through a series of enforcement actions has put members of the Coalition at risk of stop sale orders and civil penalties despite their best efforts to obtain guidance from the Agency and to conform their behavior to the requirements of the exemption.

The tactic of using enforcement actions to change the scope of a published legislative rule is being used by EPA and other federal administrative agencies with increasing frequency and audacity. It is not an issue unique to reducing air emissions of a hazardous substance such as benzene, as in *Hoechst*.[2/] The

---

1/ Pursuant to Rule 37.6, Amicus represents that this brief was not authored in whole or in part by counsel for any party, and that no entity other than Amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

2/ *Hoechst Celanese Corp. v. United States*, 964 F. Supp. 967 (D.S.C. 1996), *aff'd in part, rev'd in part*, 128 F.3d 216 (4th Cir. 1997), *petition for cert. filed*, (U.S. Mar. 23, 1998) (No. 97-1578).

situations described in this brief demonstrate that the enforcement practices of various federal agencies require judicial oversight and that the applicable standard of deference to agency interpretations in some circumstances should be reexamined.

QUESTION PRESENTED

The issue presented is whether and to what degree federal administrative agencies can properly adopt and enforce regulatory interpretations that are materially inconsistent with those announced when a rule is first promulgated, without formal amendment of the original rule.

STATEMENT OF THE CASE

Amicus adopts the statement of the case provided in petitioner's petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

A. *Hoechst* Is Not an Isolated Instance of an Illegal Agency Tactic; Federal Administrative Agencies Often Announce Substantive Changes in Regulatory Meaning Through Enforcement Proceedings Without Providing Fair Notice or Opportunity to Come Into Compliance

Hoechst is only one example of a pervasive, illegal practice used by federal administrative agencies to avoid the strictures of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-596 (1994) and other statutory authority in developing legislative rules governing citizen behavior. As the scope of regulated behaviors has grown, federal administrative agencies have struggled to develop appropriate rules. Rather than formally amending rules to address new developments or policy decisions, however, administrative agencies are increasingly "reinterpreting" the meaning of existing regulations, often for the first time in an enforcement proceeding, in ways that impose new substantive obligations on regulated entities. An integral part of this practice of reinterpretation is the assertion that the agency's posture represents nothing more than implementation of long-standing agency policy.

When used in the manner described in *Hoechst*, this approach illegally circumvents established APA public participation and regulatory review procedures to the detriment of the regulated community.

B. EPA's Most Recent Use of This Invalid Practice

1. The FIFRA Treated Article Exemption

Pesticides distributed or sold in the United States are regulated primarily under FIFRA. Like the Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994), a regulatory provision of which is at issue in *Hoechst*, FIFRA is administered by EPA. Central to FIFRA's statutory scheme is the concept of a pesticide registration (required under section 3 of FIFRA), which essentially is a license granted to a named registrant to sell or distribute a specific product for specified uses.

Under section 25(b) of FIFRA, EPA can by regulation exempt from FIFRA pesticides that the Agency determines are either adequately regulated by another federal agency or are of a character not requiring regulation under FIFRA.[3/] Mixtures and articles treated with registered pesticides to protect the formulation or article itself currently are covered by such an exemption at 40 C.F.R. § 152.25(a), which was promulgated in 1988.[4/] This provision, known as the "treated article" exemption, reads as follows:

> The pesticides or classes of pesticides listed in this section have been determined to be of a character not requiring regulation under FIFRA, and are therefore exempt from all provisions of FIFRA when intended for use, and used, only in the manner specified.
>
> (a) *Treated articles or substances.* An article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use.

3/ FIFRA § 25(b), 7 U.S.C. § 136w(b) (1994).

4/ The predecessor to 40 C.F.R. § 152.25(a) was promulgated in 1975 and was codified at 40 C.F.R. § 162.4(c) (1975). 40 Fed. Reg. 28,242 (July 3, 1975).

40 C.F.R. § 152.25(a) (1997).[2/]

Critical to the issue the Coalition wishes to highlight is the recognition that *neither the exemption, its preamble, nor any publicly distributed guidance since the promulgation of the exemption in 1988 place any restrictions on label statements describing the presence of an antibacterial or any other pesticide incorporated into a formulation or article, or on the claims related to the benefits of protecting the article itself.* The exemption simply states that an article or substance treated with or containing a pesticide to protect the article or substance itself is exempt from all requirements of FIFRA if the pesticide is registered for such use.

Until recently, the treated article exemption was an obscure and noncontroversial regulatory provision. In recent years, however, consumer concern regarding hygienic practices and safety has produced significant demand for products that contain antimicrobial protection, resulting in an abundance of these products in the U.S. marketplace. According to EPA, these products include toothbrushes, juvenile toys and related items, kitchen accessories (*e.g.*, cutting boards), sponges, mops, shower curtains, cat litter, vacuum cleaner bags, pillows, mattresses, wrist bands, and tablecloths. For the most part, these products were developed and marketed under the good faith belief that they were in full compliance with FIFRA and the treated article exemption. EPA has been aware of these specific uses for a decade or more, and on several occasions has specifically acknowledged the appropriateness of promotional statements regarding aesthetic benefits that result, for example, when paints and shower curtains are treated to resist mildew, and when cat litter is treated to reduce odors. However, as shown by the following chronology, EPA evolved a new

---

2/ Section 25(b) of FIFRA provides clear authority for EPA to reach this conclusion.

interpretation of the treated article exemption over the last year and a half as the Agency brought enforcement actions against various manufacturers.

May 16, 1988. EPA promulgates the current version of the treated article exemption.

Early 1997. In public stakeholders meetings, in response to questions EPA acknowledges that it has some concerns about treated articles, and promises to issue guidance outlining the Agency's concerns and the limits of the exemption, and to provide manufacturers with time to comply.

March 1997. Without publishing its promised clarifications, EPA issues Stop Sale, Use, or Removal Orders (SSURO)[6/] against several manufacturers and distributors of treated articles, including some who consulted with EPA's Office of Pesticide Program (OPP) staff prior to marketing their products.

May 1997. EPA releases for comment a draft of a proposal to, *inter alia*, amend section 152.25(a). The draft would modify and expand the treated article exemption to address newly identified concerns, and explicitly recognizes that modification of the published rule is needed. This draft is subsequently abandoned by EPA in favor of adopting a new interpretation of the existing rule.

June-July 1997. EPA issues press releases announcing settlements in several enforcement cases and releases language negotiated in the consent orders for labels of affected products.

September-October 1997. Additional settlements are reached, with different language accepted for the revised labels.

6/ FIFRA § 13(a), 7 U.S.C. § 136k(a) (1996). A SSURO has the immediate effect of impounding all products subject to the order, wherever located, and prohibits sale or distribution until the order is lifted. It is an enforcement tool that is coercive *in extremis*.

November-December 1997. EPA inspectors visit at least one manufacturer, Lifetime Hoan Corporation, to investigate a possible violation of FIFRA due to the sale of unregistered cutting boards with antimicrobial claims. No problems are noted.

January 14, 1998. EPA issues SSURO's to seven companies, including Lifetime Hoan, that are participating in the International Housewares Show at Chicago's McCormick Place. The SSURO's allege that the companies are marketing unregistered pesticides.

February-April 1998. Extended negotiations over label language by Lifetime results in yet different statements for new labels compared with that required for re-labeling existing stock, and different from labels authorized by earlier settlements.

April 17, 1998. EPA publishes a *Federal Register* notice in which it memorializes a new interpretation of the exemption that it had developed through enforcement actions during 1997.[7/] The notice also officially announces the availability of a draft Pesticide Registration (PR) notice intended to "clarify" EPA's interpretation of the exemption.[8/] The *Federal Register* notice reveals the full extent of the substantive modification of the treated article exemption that

---

7/ 63 Fed. Reg. 19,256 (Apr. 17, 1998).

8/ PR notices are policy statements made available by EPA to pesticide manufacturers, formulators, producers, and registrants, and are intended to clarify specific aspects of FIFRA and its implementing regulations and to set forth Agency policy. PR notices are made available to the public for comment. However, other than a notice announcing their availability, PR notices are not published in the *Federal Register* nor are they subject to a formal proceeding. Under the PR notice rubric, the agency is freed from the burden of disclosing the basis for its decision, and review is not possible unless and until an enforcement action is initiated.

had occurred during 1997 and itself notes that the PR notice contains "new elements" of the exemption.[9/]

2. *Lifetime Hoan* Is the Archetype of Illegal Use of the Enforcement Tool

EPA's enforcement action against Lifetime Hoan shows that the process of reinterpretation continues and that the offending method used in *Hoechst* is widespread. Indeed, because a FIFRA stop sale order causes an immediate marketing interruption (in addition to the monetary penalties that usually accompany settlement), Lifetime's case is in some respects more troubling than *Hoechst*.

In 1997, Lifetime Hoan began developing a line of houseware products containing an antimicrobial ingredient. Lifetime was well aware of the treated article exemption, and took extraordinary efforts to ensure compliance with its requirements. Microban® Plastic Additive "B," the antimicrobial used by Lifetime in the manufacture of the subject products, is specifically registered by EPA for use in the manufacture of the types of products distributed by Lifetime, and, in its registration, EPA acknowledged that the purpose of Microban® "B" was to provide a hygienic surface. Lifetime consulted the language of the regulation itself, the preamble to

---

9/ 63 Fed. Reg. at 19,257. Despite its assertion that the policy statement is a "clarification" of the existing rule, some of the new elements include: (1) terms such as "antibacterial," "antimicrobial," "germicidal," and "germs," are prohibited from appearing in the product name and on other labeling and advertising materials; (2) claims, *formerly permitted*, that the protection of the article provided by the applied pesticide treatment has an aesthetic benefit (prevention of stains and odor) are prohibited; and (3) a proposal to prohibit the use of the phrase "mildew proof" on paint and a limitation of claims solely to in-can preservation.

the 1988 final rule, and the 1975 rule that preceded it. As noted above, neither the regulation nor the preamble to the 1988 rule prohibits or limits promotional statements regarding the benefits for the article itself of such protection, and no other formal guidance on the exemption with regard to these issues had been published by EPA.

Lifetime also was aware that EPA had taken enforcement actions against manufacturers of treated articles and carefully reviewed the settlements in these cases for additional guidance on acceptable claims. For example, Lifetime reviewed the settlement between EPA and the Minnesota Mining and Manufacturing Company (3M), regarding a treated sponge product. In *3M*, EPA agreed to the use of placards stating "Inhibits Odor-Causing Germs in the Sponge," and "Does not disinfect or kill germs on surfaces."[10/] Moreover, Lifetime Hoan used language that was consistent with language deemed acceptable by EPA in official public documents released as part of the Agency's enforcement action against certain Hasbro plastic toys that were manufactured using Microban® "B."[11/]

On November 19, 1997, and November 26, 1997, EPA Region II officials inspected Lifetime Hoan's Westbury, New York, and Dayton, New Jersey, warehouse facilities, to investigate a possible violation of FIFRA due to the sale of

---

10/ *In re Minnesota Mining and Manufacturing Company*, No. 5-FIFRA-97-027, Consent Agreement and Consent Order (EPA Sept. 29, 1997).

11/ In an April 22, 1997 consent order, EPA and Hasbro agreed to corrective advertisements that named the affected toys and that conspicuously stated "Microban Antibacterial Protection Built in to Protect the Toy! Inhibits the Growth of Bacteria!" *In re Hasbro, Inc.*, No. FIFRA 97-H-06, Consent Agreement and Consent Order (EPA Apr. 22, 1997).

cutting boards bearing antimicrobial claims. In Dayton, EPA inspectors obtained a packaged, labeled, cutting board, verbally affirmed, when asked, that no violations were observed, and took no other action.

At the January 1998 Chicago housewares show, Lifetime Hoan discovered for the first time that its conclusions regarding the exemption were incorrect and that EPA believed that Lifetime was distributing unregistered pesticides in violation of section 12(a)(1)(A) of FIFRA.[12/] EPA alleged that the following claims took the affected products out of the exemption, making them pesticides requiring registration:

> "Microban Antibacterial Protection built in to inhibit the growth of bacteria on the product"; "Built-in protection, engineered to last the life of the product"; "This Farberware gadget incorporates built-in Microban antimicrobial protection"; "Microban protection inhibits the growth of bacteria, mold, and mildew on the product."[13/]

Lifetime was compelled to settle the matter quickly so that it could resume shipment of these products. In the Consent Agreement and Consent Order (CACO) that Lifetime Hoan signed, Lifetime agreed to affix stickers to all allegedly violative products before resuming shipments. The stickers contained the following language:

12/ 7 U.S.C. § 136j(a)(1)(A) (1996).

13/ *In re Lifetime Hoan Corp.*, No. FIFRA 98-H-04, Consent Agreement and Consent Order (EPA Feb. 13, 1998).

> Microban antibacterial protection is built in to inhibit the growth of bacteria that may affect the plastic in the product and does not protect users or others against food-borne bacteria. Always clean and wash the product thoroughly before and after each use.[14/]

In the CACO, EPA also dictated the specific size of the sticker, mandated the font size and style, and limited its placement and prominence on the packaging itself.

Lifetime was provided with no notice that its course of conduct and its exercise of commercial speech was anything but in full compliance with the treated article exemption, and had no opportunity to conform its conduct to EPA's hidden, evolving interpretation of the exemption. As in *Hoechst*, Lifetime's deficiency was simply its failure to conform its conduct (*i.e.*, use of specific wording) to a binding, secret, changing Agency position, which continued to develop even as negotiations in its case with EPA proceeded.[15/]

[14/] The origin of this "acceptable" treated article language, and its placement and prominence, was not then and is not now published or known. It is also important to note that, even with the corrective stickers applied, EPA still considers these articles to be illegal unregistered pesticides. While the Agency is allowing the stickered products to be sold, it is EPA's position that the use of the word "antibacterial" in describing the treatment applied to an article violates the exemption.

[15/] In its April 17, 1998, *Federal Register* notice, EPA cites the series of CACO's as public notice of its interpretation. Unfortunately for Lifetime, the CACO it signed did not exist when it developed its product lines. In any event, CACO's coerced from parties desperate to be freed from the extraordinary burden of a SSURO cannot be viewed as legal precedent for additional extra-regulatory requirements.

In the case of the treated articles at issue, there is no imminent danger; EPA Administrator Carol Browner has publicly acknowledged that products manufactured using Microban® "B" pose no safety risk even in a situation where children would have potential intimate and frequent exposure.[16/]

C. EPA's Tactic Illegally Circumvents the APA and Regulatory Review Statutes

The Coalition believes that the heart of the issue in *Hoechst*, use of enforcement proceedings to announce and impose new, inconsistent policies regarding substantive rules, and the undue deference the courts have given to such agency action, are amply illustrated by EPA's recent handling of treated articles. The connection between cause and effect is succinctly made by the following passage describing EPA's pattern of enforcement practices:

> Where an agency can nonlegislatively impose standards and obligations that as a practical matter are mandatory, it eases its work greatly [when following these practices] in several undesirable ways. It escapes the delay and the challenge of allowing public participation in the development of its rule. It probably escapes the toil and the discipline of building a strong rulemaking record. It escapes the discipline of preparing a statement of the basis and purpose justifying the rule. It may also escape APA publication requirements and Office of Management and Budget regulatory review.

16/ U.S. Environmental Protection Agency, Press Release, *EPA Acts to Prevent Playschool Toy Manufacturer Hasbro, Inc., From False Claims About Protecting Children from Microbial Infections* (Apr. 18, 1997).

> And if the agency can show that its informal document is not final or ripe, it will escape immediate judicial review. Indeed, for practical reasons it may escape judicial review altogether . . . One can readily understand how a government instrument so quick, cheap, largely unchecked and low in risk, and yet so effectual, may tempt some agencies to slight the APA's mandates.

Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1317-18 (1992).

EPA's actions in *Hoechst* and *Lifetime*, and its announced enforcement policy regarding treated articles, illustrate a legally deficient and impermissible vehicle for substantively amending the scope and effect of a published legislative rule. A federal agency cannot attach additional binding obligations to a substantive regulation without adhering to the legislative process mandated by the APA.[17/] The

---

17/ EPA's own Environmental Appeals Board (EAB) has recognized the problems that occur when the regulated community is not provided with fair notice. *See CWM Chemical Servs., Inc.*, No. TSCA-PCS-91-0213 (EPA May 15, 1995). In dismissing EPA's complaint on the basis that the Agency failed to provide adequate notice to the regulated community, the court stated

> Basically we are holding the Agency to a standard of notice that requires the Agency to express the intent of its regulations with sufficient clarity that those who may be subject to penalties for violating the regulations have fair warning of conduct prohibited or required by the regulations.

The Coalition believes that this decision, which the EAB specifically applied to all of EPA's regulatory programs, correctly requires EPA to

Coalition believes that EPA's proposed approach also sidesteps compliance with other statutes such as the Paperwork Reduction Act , 44 U.S.C. §§ 3501-3520 (1994) and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 111 Stat. 2592, and improperly circumvents the checks and balances within the Executive Branch provided Executive Order 12,866.[18/]

D. EPA's Illegal Use of the Enforcement Process Continues Today

Having coerced several manufacturers into entering into consent agreements, EPA has now publicly announced that it intends to proceed in amending the exemption without rulemaking. According to the April 1998 *Federal Register* notice, EPA will maintain and enforce a policy for treated articles that is extracted from its then recent enforcement proceedings. Significantly, according to the *Federal Register* notice, EPA will bring enforcement actions against products that use the terms *antibacterial, antimicrobial, or germicidal* in product literature unless the term appears only in a specific context that EPA apparently has determined is the only possible

---

clarify its substantive interpretations prospectively through legislative rulemaking.

[18/] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). Regardless of how they are styled by the Agency, EPA's *Federal Register* and draft PR notices fall squarely within the SBREFA and APA definition of "rule," and the term "regulations or rules" as it is defined under 5 U.S.C. § 551(4) (1994) and Exec. Order No. 12,866 § 3(d). The burden falls on the regulated community to call EPA to task for avoiding its responsibilities to the public.

statement that will not be misleading to consumers.[19] The requirements specified in the *Federal Register* notice constitute requirements that are not at all apparent on the face of the rule (or any other guidance previously published by EPA) and, as in *Hoechst*, these substantive limitations have evolved only in the course of enforcement actions brought on the basis of the silently and secretly amended rule.

This approach offends any reasonable notion of due process, and amounts to a deprivation of the right to commercial free speech.[20] EPA's new enforcement policy is just that — new. Although the Agency insists that the policy is merely the formalization of longstanding and unchanging Agency positions, it plainly is not.

E. Other Federal Agencies Use This Tactic

From time to time, other federal agencies' actions that parallel EPA's evasion of the APA's prescriptions are properly recognized and redressed by federal courts.[21] The Court has

---

[19] The Coalition is not aware that EPA is known to have expertise in predicting consumer perceptions.

[20] *See Central Hudson Gas & Electrical Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

[21] Anthony, *supra*, cites many examples of federal agencies using nonlegislative rules to bind the public. Anthony, *supra*, at 1333-39; *San Diego Air Sports Ctr., Inc. v. FAA*, 887 F.2d 966 (9th Cir. 1989) (FAA letter prohibiting parachuting in terminal control area is rule subject to APA rulemaking requirements); *Southern Cal. Aerial Advertisers' Ass'n v. FAA*, 881 F.2d 672 (9th Cir. 1989) (FAA letter closing airspace to fixed-wing aircraft not adopted through APA rulemaking procedures represents change in FAA policy and is invalid); *United States v. Picciotto*, 875 F.2d 345 (D.C. Cir. 1989) (additional U.S. Park Service restrictions on demonstrations and events in park not adopted through

previously recognized the key role of the courts in supervising federal administrative agencies and the varying degrees of deference owed to agency interpretations. In *Martin v. Occupational Safety and Health Review Commission*, Justice Marshall noted that

> [a]lthough not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers . . . informal interpretations are still entitled to some weight on judicial review . . . the decision to use [an enforcement action] as the initial means for announcing a particular

---

APA rulemaking procedures invalid); *Jerri's Ceramic Arts, Inc., v. Consumer Prod. Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989) ('interpretive statement' regarding removal of exemption from rule banning small childrens' toys and providing CPSC with power to enforce violations set aside for failure to comply with rulemaking requirements); *Alaska v. Department of Transp.*, 868 F.2d 441 (D.C. Cir. 1989) (FAA orders regarding unfair and deceptive advertising subject to APA rulemaking requirements); *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464 (D.C. Cir. 1980) (Secretary of Labor 'interpretive rule and general statement of policy' regarding employee pay for accompanying inspectors vacated for failing to comply with APA rulemaking requirements); *Texaco, Inc. v. Federal Power Comm'n*, 412 F.2d 740 (3d. Cir. 1969) (Federal Power Commission order amending regulations under the Natural Gas Act to provide for compound interest rates set aside for lack of adequate notice under the APA); *Prows v. United States Dept. of Justice*, 704 F. Supp. 272 (D.D.C. 1988), *aff'd*, 938 F.2d 274 (D.C. Cir. 1991) (Bureau of Prisons' statement requiring allocation of pay to certain financial obligations illegally promulgated); *United States v. Bioclinical Sys., Inc.*, 666 F. Supp. 82 (D. Md. 1987) (draft FDA inspection guidelines cannot be used to establish enforceable current good manufacturing practices); *Bellarno Int'l Ltd. v. FDA*, 678 F. Supp. 410 (E.D.N.Y. 1988) (FDA's failure to conduct notice-and comment rulemaking procedures prior to issuance of 'import alert' violates the APA).

> interpretation may bear on the adequacy of notice to regulated parties . . . .

499 U.S. 144 (1991) (citations omitted).

Despite the Court's admonition in *Martin*, the U.S. Occupational Safety and Health Administration (OSHA) recently pursued such "non-regulation regulations" and brought enforcement actions based upon new, substantive interpretations, in a case involving OSHA's Hazard Communication Standard (HCS).

In 1983, OSHA adopted language requiring manufacturers of hazardous chemicals to develop "appropriate hazard warnings" to be placed on shipping containers of such products.[22] Nearly three years later, OSHA interpreted this provision in a "Compliance Instruction,"[23] ostensibly a document instructing its inspectors how to apply and enforce the regulation, to require the identification of "target organs" as part of the appropriate hazard warning. The specific regulatory provision did not mention target organs, nor was it clear that manufacturers should look beyond this plain language to determine that something more than what was generally accepted as good practice was required. The Compliance Instruction, in a most circuitous logic, stated that manufacturers should have followed the following path: (1) "health hazards" were defined in the regulation; (2) Appendix A, characterized as a "mandatory" appendix, was referenced in that regulatory definition; (3) manufacturers should have known to look to

---

[22] 29 C.F.R. § 1910.1200(f)(1) (1997).

[23] OSHA Compliance Instruction (CPL), *CPL 2-2.38C, Inspection Procedures for the Hazard Communication Standard, 29 C.F.R. 1910.1200, 1915.99, 1917.28, 1918.90, 1926.59, 1928.21* (Oct. 1990).

Appendix A; (4) "target organs" were discussed in Appendix A in one of seven examples of "health hazards"; and (5) manufacturers should have known to further infer that such target organs were a mandatory component of an appropriate hazard warning.

OSHA aggressively enforced its new target organ requirement and cited American Cyanamid Company for failing to include target organs on labels of one of its products. On appeal, the Occupational Safety and Health Review Commission (OSHRC) rejected OSHA's citation on the grounds that it was a "departure from the original policy under the HCS . . . [and] because the departure was inadequately explained."[24/] The Court of Appeals for the Sixth Circuit, in a most extraordinary example of deference to an executive agency, concluded, essentially, that because OSHA's logic could be followed — however convoluted the path to the result — that the agency's interpretation was not unreasonable and the court had no reason or basis to reject it.[25/] *Cyanamid* is now invariably cited by OSHA counsel in administrative adjudicatory proceedings for the proposition that deference is warranted.

F. By Giving Undue Deference to Agency Enforcement Interpretations, Courts Are Promoting an Illegal Practice

As pointed out by petitioner, because courts have misinterpreted and misapplied the standard set forth by this Court in non-enforcement cases such as *Chevron, U.S.A., Inc.*

24/ *Secretary of Labor v. American Cyanamid Co.*, No. 86-681, 1992 WL 30659 at *1 (OSHRC Feb. 7, 1992).

25/ *Martin v. American Cyanamid Co.*, 5 F.3d 140 (6th Cir. 1993).

v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) and its predecessor cases, *Udall v. Tallman*, 380 U.S. 1 (1965), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945),[26] agencies continue to act illegally knowing that even if their actions are challenged, a reviewing court will likely "rubber stamp" the agency action unless it is clearly ridiculous. *See, e.g., Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (courts will defer to agency interpretations in all but extraordinary cases)). Knowing that reviewing courts will grant virtually unbridled deference, EPA and other federal agencies are encouraged to become more aggressive in their actions.

It appears from *Hoechst*, recent enforcement cases involving treated articles, and from the cases cited above, that this Court should accept this case for review to reemphasize the important role of the judiciary in supervising the administrative process.

---

[26] Other commentators have characterized the practice of ambiguous interpretation by agencies as unfair and inappropriate. A recent Working Paper published by the Washington Legal Foundation identified the problem as one based on an incorrect presumption. Chadd and Bowman argue that whatever deference is warranted to agencies' expertise in rulemaking is not justified when enforcement is the context, and challenge the rationale in *Bowles* that "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. at 414. The authors argue that the result is patently unfair, giving administrative agencies license to adopt vague regulations and to interpret them capriciously to suit their immediate needs. Charles M. Chadd & Jerome K. Bowman, *Agencies' Enforcement of Ambiguous Regulations Don't Deserve Judicial Deference* (Washington Legal Found., Critical Legal Studies, Working Papers Series No. 84, 1988).

CONCLUSION

For the foregoing reasons, amicus respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN B. DUBECK*
DAVID G. SARVADI
THOMAS C. BERGER
KELLER AND HECKMAN LLP
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4100
Counsel for Amicus Curiae
*Counsel of Record

May 22, 1998

Supreme Court, U.S.
FILED
MAY 22 1998
OFFICE OF THE CLERK

(8)

No. 97-1578

In The
Supreme Court of the United States
October Term, 1997

HOECHST CELANESE CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* IN SUPPORT OF THE PETITIONER

Nancie G. Marzulla
DEFENDERS OF
PROPERTY RIGHTS
1350 Connecticut Ave., N.W.
Suite 410
Washington, D.C. 20036
(202) 822-6770

April 22, 1998

* *Amici* listing continued on next page

28 pp

[CONTINUED FROM COVER]

BRIEF *AMICI CURIAE* OF

DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION
EAST TEXAS HERITAGE ASSOCIATION
FRONTIERS OF FREEDOM INSTITUTE
HILL COUNTRY HERITAGE ASSOCIATION
LAND RIGHTS FOUNDATION
MAINE CONSERVATION RIGHTS INSTITUTE
PEOPLE FOR THE WEST! ACCORD CHAPTER
STOP TAKING OUR PROPERTY
TEXAS JUSTICE FOUNDATION
TRANS TEXAS HERITAGE ASSOCIATION

TIMBER PRODUCERS ASSOCIATION OF MICHIGAN AND WISCONSIN

QUESTIONS PRESENTED

1) Whether the *Chevron* Doctrine requires a court to defer to the agency where the agency invokes the power of the court to impose penalties?

2) Whether the imposition of penalties for the violation of a regulation whether there has been "fair notice" and for which there has not been a reasonable time to comply violates the Due Process Clause?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INDENTITY AND INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 6

REASONS FOR GRANTING THE PETITION 8

I. THIS CASE PRESENTS AN EXCELLENT OPPORTUNITY FOR THIS COURT TO RESOLVE A SPLIT AMONG THE CIRCUITS AS TO WHETHER THE *CHEVRON* DOCTRINE REQUIRES COURTS TO DEFER TO THE AGENCY WHERE THE AGENCY INVOKES THE POWER OF THE COURT TO IMPOSE PENALTIES 9

II. THIS CASE ALSO RAISES AN IMPORTANT CONSTITUTIONAL ISSUE THAT NEEDS RESOLUTION BY THIS COURT – WHETHER THE IMPOSITION OF PENALTIES BEFORE IT IS POSSIBLE TO COMPLY – ENCOURAGES AGENCY ENTRAPMENT OF INNOCENT VIOLATORS CONTRARY TO THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT 15

TABLE OF CONTENTS – cont.

III. FINALLY, THIS CASE AFFORDS THIS COURT AN OPPORTUNITY TO PROVIDE GUIDANCE TO FEDERAL AGENCIES REGARDING WHEN PENALTIES CAN BE LEGITIMATELY IMPOSED IN ORDER TO ACHIEVE REGULATORY COMPLIANCE CONSISTENT WITH THE OVERALL REGULATORY OBJECTIVE AND WHEN THE IMPOSITION OF SUCH PENALTIES CONSTITUTES NOTHING MORE THAN AN ABUSE OF REGULATORY POWER 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Accord Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) 14

Checkosky and Aldrich v. SEC, No. 97-1137, 1998 U.S. App. LEXIS 6179 (D.C. Cir. Mar. 27, 1998) 7, 9

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) ..... passim

City of Boerne v. Flores, ___ U.S. ___, 117 S. Ct. 2157, (1997) 10

Clinton v. Jones, ___ U.S. ___, 117 S.Ct. 1636 (1997) 10

Daniels v. Williams, 474 U.S. 327 (1986) 8

Dico, Inc. v. Diamond, 35 F.3d 348 (8th Cir. 1994) 14

General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) 8, 16

Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110, 115 S.Ct. 900 (1995) 13

Kolendar v. Lawson, 461 U.S. 352 (1983) 7

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803) 9

Martin v. OSHRC, 499 U.S. 144 (1991) 16

TABLE OF AUTHORITIES - cont.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 15

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 8

Pfaff v. HUD, 88 F.3d 739 (9th Cir. 1996) 14, 18, 20

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 14

Redwing Carriers v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996) 13

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 6, 11

United States v. Celanese Eng'g Resins, Inc., No. H95-0619 (S.D. Tex. filed March 2, 1995) 3

United States v. Hoechst Celanese Corp., No. 0-92-1879-17 (D.S.C. filed July 1, 1992) 3

United States v. Hoechst Celanese Corp., No. 93-0864-R (W.D. Va. filed November 17, 1993) 3

United States v. Ottati & Goss, Inc., 900 F.2d 429 (1st Cir. 1990) 13

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982) 14

TABLE OF AUTHORITIES - cont.

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. III.....9

U.S. CONST. amend. V 15

STATUTES

5 U.S.C. 553 (b).....17

40 C.F.R § 61.05(c)(1997) 17

40 C.F.R. § 61.110 (c)(2)(1997).....3

OTHER AUTHORITIES

Marianne Lavelle, "Environmental Vise: Law Compliance," 30 Nat'l L.J. S1 (1993).....20

Richard Lazarus, "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law," 83 Geo. L.J. 2536 (1995) 19

TREATISES

Montesquieu, *The Spirit of the Laws*, 151-2 (Nugent trans. 1949).....10

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioner.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas.

East Texas Heritage Association (Pecan Gap, TX) has actively challenged the erosion of private property rights.

Frontiers of Freedom Institute (Arlington, VA) seeks through its research and educational activities to defend the constitutional rights of all Americans and to restore constitutional limits on federal, state, and local governments.

Hill Country Heritage Association (London, TX) was formed in response to the proposed dedication of twelve Texas counties as habitat for an endangered species.

Land Rights Foundation (Gloversville, NY) is dedicated to private property rights and private conservation, through education and research.

---

[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their members or counsel) contributed financially to the preparation of this brief.

Maine Conservation Rights Institute (Lubec, ME) is a research and educational institute serving the land-owning public of Maine.

People for the West! ACCORD Chapter (Scottsdale, AZ) is a grassroots organization created to support western communities against the overreaching hand of government.

STOP Taking Our Property (Chesterton, IN) is comprised of 300 farm families who live along the Salt Creek and Little Calumet Rivers in Porter County, Indiana.

Texas Justice Foundation (San Antonio, TX) seeks to protect, through litigation and education, those fundamental freedoms and rights essential to the preservation of American society. To reinvigorate public education, strengthen the family, and promote the private sector business climate we must limit government to its traditional and appropriately limited role.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states.

STATEMENT OF THE CASE

Petitioner, Hoechst Celanese Corporation ("HCC"), is a chemical manufacturing company and in 1984 had four plants that used benzene as part of their manufacturing process. Beginning in 1992, respondent United States filed three, virtually identical, enforcement actions against HCC seeking millions of dollars in penalties, for an alleged violation of an EPA regulation that petitioner had essentially complied with by the time the lawsuits were filed. *United States v. Celanese Eng'g Resins, Inc.*, No. H95-0619 (S.D.

Tex. filed March 2, 1995)("the Bishop case"); *United States v. Hoechst Celanese Corp.*, No. 93-0864-R (W.D. Va. filed November 17, 1993)("the Celco case"); and, the instant case, *United States v. Hoechst Celanese Corp.*, No. 0-92-1879-17 (D.S.C. filed July 1, 1992)("the Celriver case").

Each of these lawsuits alleges the same violation of a Clean Air Act regulation promulgated by the Environmental Protection Agency ("EPA") on June 6, 1984, as part of benzene emission standards (National Emission Standard for Equipment Leaks of Benzene)("benzene regulations"). The regulations expressly exempt any equipment in a plant that used up to 1,000 megagrams (1,000 metric tons) of benzene per year:

> Any equipment in benzene service that is located at a plant site designed to produce or use less than 1,000 megagrams of benzene per year is exempt from the requirements of [this regulation].

40 C.F.R. § 61.110 (c)(2)(1997).

There is no question that in this case petitioner reasonably believed that the exemption applied to its Celriver plant operations (as well as the use of benzene at the other two plants). App. 41a-42a. Both the preamble to the rule and other documents used in the rulemaking interpret the exemption to apply to the amount of benzene "consumed" or the amount of benzene "in inventory" at a plant site. App. 50a-51a; 62a. By either measure petitioner's Celriver plant was exempt, since it annually consumed and had in inventory a combined total of far less than 1,000 megagrams of benzene. App. 42a. In addition, between 1984 until 1989, state and federal regulators told petitioner, both orally and in writing, that its use of benzene in the Bishop plant in Texas

was exempt. *Id.* For example, in 1984, Texas regulators – following consultation with EPA Region VI – formally confirmed that the Bishop Plant was exempt from the benzene regulations. Petitioner reasonably relied on this confirmation. A copy of the letter confirming the exemption was sent to EPA Region VI by the then-Texas Air Control Board. App. 56a. Petitioner's use of benzene was exactly the same in the Celriver plant, which is the subject of this lawsuit, as it was in the Bishop plant. App. 42a, 62a, 65a.

Nevertheless, in 1990, respondent informed petitioner that its earlier interpretation of the regulation was not the proper interpretation of the rule, and that the agency in some unpublished, internal documents had defined the term "use" to mean "multiple counting." App. 30a-33a. Upon notification of respondent's shift in policy, petitioner immediately provided respondent with a compliance plan, consistent with the terms of respondent's compliance rules which allowed a company two years to comply. App. 78a-79a; 83a. By September 1991, petitioner was fully in compliance with respondent's new interpretation of its rule. Pet. 6.

Despite the lack of any environmental benefit to be achieved by an enforcement action and despite the fact that petitioner at all times has made a good faith effort to comply with the rule, on July 1, 1992, respondent filed the instant enforcement action against HCC. On May 10, 1996, Judge Anderson for the district court of South Carolina found that respondent's current interpretation of the regulation, which was neither published nor communicated to the state of Texas which had the delegated authority to enforce the Clean Air Act, did not provide petitioner fair notice. App. 72a. The district court further concluded that the government's interpretation of the benzene exemption did not comply with constitutionally based principles of due process. App. 71a. Accordingly, the district court held that petitioner could not

be found liable or penalized for having violating the rule when it was published, and that petitioner had "acted responsibly to meet -- and far exceed -- the terms of the [benzene regulation]" within the regulatory time for compliance. App. 69a-70a.

The district court specifically and strongly renounced the practice of agency staff changing regulatory meaning through unpublished internal guidance documents. The court below stated that agencies must *publish* clarifying guidance in order to ensure that they clearly communicate to the regulated community the meaning of a regulation as it will be enforced:

> During the past 12 years, the government has provided several different, inconsistent articulations and applications of [the regulation] . . . . Awarding penalties where the problem is the language chosen by the agency, rather than any unwillingness to comply would only "delay the day when . . . regulations will be written in clear and concise language" so that regulated parties "will better be able to understand and observe them."

App. 58a n.12, 60a.

On appeal, the Fourth Circuit held that it was required by this Court's seminal decision in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to defer to EPA's present interpretation of the rule so long as EPA's interpretation was not "nonsensical." App. 8a. However, the court below held that petitioner had not received fair notice of respondent's interpretation of the rule and as a result held that petitioner could not be penalized for failure to comply with the benzene

regulations from 1984 until 1989. But, the court below held that petitioner could be held liable 90 days following actual notice of the new regulatory interpretation, even if compliance within such a short time frame would have been impossible. App. 8a.

SUMMARY OF ARGUMENT

In 1994 Justice Thomas, in dissent, joined by three other justices, issued a strong criticism of agency rulemaking that could have been written with the instant case in mind:

> It is perfectly understandable, of course, for an agency to issue vague regulations because to do so maximized agency power and allows the agency greater latitude to make laws through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties might have adequate notice concerning the agency's understanding of the law. ... An agency whose powers are not limited either through meaningful statutory standards or . . . rules poses a serious potential threat to liberty and democracy.

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).[2]

---

[2] Moreover, EPA's tendency to promulgate ambiguous regulations, rather than give them specificity through the formal rulemaking process, stands on its head the rule-making process established by the Administrative Procedure Act, 5 U.S.C.§ 553. It deprives the public of a meaningful opportunity to comment, while evading congressional mandates of OMB review, analysis under the Paperwork Reduction Act, 44 U.S.C. § 3501 and Regulatory Flexibility Act, 5 U.S.C. § 601, avoids the necessity of

The failure of federal agencies to promulgate clear standards in regulations is a problem of increasing concern as reflected in a recent decision by the U.S. Court of Appeals for the D.C. Circuit in *Checkosky and Aldrich v. SEC*, No. 97-1137, 1998 U.S. App. LEXIS 6179 (D.C. Cir. Mar. 27, 1998). In *Checkosky*, the court gave a stinging criticism of the agency' ambiguous rulemaking to which severe penalties for violation were attached:

> It is simple impossible to know in advance what sorts of negligent errors will meet this "standard", we can imagine both narrow and potentially all-embracing constructions. There is no justification for the government depriving citizens of the opportunity to practice their profession without revealing the stand and they have been found to violate.

Id. at 4.

There would be seem to be little question that such agency rulemaking runs afoul of the Due Process Clause of the Fifth Amendment, *see, e.g., Kolendar v. Lawson,* 461 U.S. 352 (1983)(holding state penal statute void for vagueness on Due Process grounds); *Grayned v. City of*

---

reporting significant rules to Congress under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C. and 15 U.S.C.), and relieves the EPA of compliance with various Executive Orders (*e.g.*, "Governmental Actions and Interference With Constitutionally Protected Property Rights", Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988)). It is clear from the administrative record in this case that EPA's 1989 interpretation would not have passed muster under many of these requirements, possibly explaining why the agency did not put forward its "multiple counting" interpretation until after the rule-making process had been concluded.

Rockford, 408 U.S. 104 (1972)("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined"); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)(holding vagrancy ordinance void for vagueness). As this Court explained in *Daniels v. Williams*, 474 U.S. 327, 331 (1986), the purpose of the Due Process Clause is to prevent government from abusing its power or employing it for purposes of oppression. Where severe penalties attach to agency interpreted regulations that begin the instant that notice is given, then clearly the Due Process Clause is implicated. The Due Process Clause, quite simply, forbids all deprivations of property by government action that is arbitrary, unreasonable or violative of fundamental principles of fairness. *Id.*

Thus, the issue of substantial constitutional importance in this case is not whether the agency had the power to interpret its regulations, but whether it was entitled to impose severe monetary penalties for failure to comply with an interpretation of which petitioner had not received "fair notice."

The other related question is whether an agency can legitimately pursue an enforcement action where it has failed to communicate clearly to the regulated community the standards contained in a regulatory program? When environmental laws and regulations are overly complex and ambiguous, it prevents the regulated community from understanding what conduct is permissible or prohibited. This case presents an opportunity for this Court to require agencies to promulgate regulations consistent with the requirements of the Due Process Clause and that further the legitimate purposes of environmental rules and regulations.

In addition, this case affords this Court the opportunity to revisit the *Chevron* doctrine and its application in the context of agency enforcement actions in

which the power of the court is invoked to "rubber stamp" agency decisions of penalty awards.

Without guidance from this Court with respect to these important constitutional issues on which the courts below are split, the door remains wide open for federal agencies to continue to promulgate and interpret regulations which the D.C. Circuit Court of Appeals recently described in one case as "almost deliberately obscurantist." *Checkosky and Aldrich*, 1998 U.S. App. LEXIS 6179, at *11 (D.C. Cir. March 27, 1998). Accordingly, *amici curiae* strongly urge this Court to grant petitioner a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. This case presents an excellent opportunity for this Court to resolve a split among the circuits as to whether the *Chevron* doctrine requires courts to defer to the agency where the agency invokes the power of the court to impose penalties.

It is a bedrock principle of our system of jurisprudence, premised on a separation of powers among the three branches of government, that courts are the final arbiters of what the law is:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who can apply the rule to particular cases, must of necessity expound and interpret that rule.

Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803). *See also* Article III, U.S. Const.

The notion that powers be split among the three branches of government reflects the framers' historical understanding that dates back to Montesquieu who argued that any combination of the judicial, legislative or executive powers would create a system with an inherent tendency towards tyrannical actions. Montesquieu, *The Spirit of the Laws*, 151-2 (Nugent trans. 1949).

That historical understanding of the importance of a governmental system of "checks and balances" upon which this country was founded is reflected in modern decisions of this Court. *See, e.g., Clinton v. Jones*, ___ U.S. ___, 117 S.Ct. 1636, 1649 (1997)("[We] have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law."), *City of Boerne v. Flores*, ___ U.S. ___, 117 S. Ct. 2157, 2162 (1997) ("judicial authority to determine the constitutionality laws" rests squarely on the judiciary branch as recognized in *Marbury v. Madison*.) Indeed, in 1994 Justice Thomas in dissent, joined by three other justices, explained the dangers of ignoring the separation of powers principle in agency decision making:

> It is perfectly understandable, of course, for an agency to issue vague regulations because to do so maximized agency power and allows the agency greater latitude to make laws through adjudication rather than through the more cumbersome rulemaking process. Nonetheless, agency rules should be clear and definite so that affected parties might have adequate notice concerning the agency's understanding of the law. . . . An agency whose powers are not limited either through meaningful statutory standards or . . . rules poses a

> serious potential threat to liberty and democracy.

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).

Hence, this Court has carefully carved out an exception where the primacy of the judicial branch yields to agency decision making. Specifically, the court will defer to an agency rule validly interpreting a statute where Congress expressly grants the agency that authority. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)(holding that where a statute is ambiguous the judiciary must defer to a reasonable interpretation of the statute offered by the agency charged with administering the statute). More recently, the *Chevron* exception was extended in *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994), to allow judicial deference to an agency's interpretation of its own programmatic regulation where such authority has been granted by Congress. Although this Court has thus allowed the fusion of quasi-legislative rulemaking authority with quasi-judicial interpretative authority, it has never approved wholesale transfer of judicial power of executive branch agency in the guise of "deference."

The instant case takes the *Chevron* doctrine of deference beyond any decision of this Court and holds that not only is an executive branch agency entitled to make the law (via promulgation of a regulation) and to interpret the law that it has made, it is entitled to usurp the court's role in also assigning liability for the regulation. Hence, the court below has accomplished in one fell swoop the consolidation of power into the executive branch to make the law, interpret the law, and exercise the prerogative of the court to assign liability for violating the law: EPA promulgated the benzene regulations, EPA then interpreted the regulation at issue in this case, then assigned liability and penalties to HCC by convincing the court below that the dual doctrines of

deference and strict liability effectively eliminated any meaningful defense to EPA's claim.

> A court's review of regulations under Section 112 of the Clean Air Act, such as the Benzene Leaks NESHAP, is particularly limited because of the broad discretion congress gave EPA to control hazardous air pollutants. Under the Clean Air Act in effect when EPA promulgated the Benzene Leaks NESHAP, Congress delegated authority to EPA to identify hazardous air pollutants and their sources, to determine methods of controlling emissions from these sources, and to determine the level of control necessary to protect public health. Through its exercise of these powers, EPA has developed considerable scientific and policy expertise in the regulation of hazardous air pollutants. This court treads lightly when construing the scope of exemption that allows a source of hazardous air pollutants to go unregulated. The court will no substitute its own judgment on the scope of the exemption unless EPA's interpretation is plainly erroneous or inconsistent with the regulation.

App. 39a.

The decision of the Fourth Circuit in this case is also in sharp contrast to decisions of other circuit courts of appeals which have rejected such an expansive grant of deference when the power of the court is invoked to award penalties for violating an agency created and interpreted rule.

Justice Breyer writing for the Court of Appeals for the First Circuit flatly rejected EPA's argument that the Chevron doctrine required the court simply to grant EPA's requested injunctive relief without any independent judicial review in *United States v. Ottati & Goss, Inc.*, 900 F.2d 429 (1st Cir. 1990), explaining:

> Precisely what, in the ordinary case, would be a court be expected to review? EPA's decision to ask the Attorney General to bring the action? The Attorney General's decision to file suit? Is the EPA supposed to win automatically as long as its decision to bring the action was reasonable?

Id. at 434.

Similarly, the Court of Appeals for the D.C. Circuit held in *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110, 115 S.Ct. 900 (1995). held that EPA could not promulgate binding regulations setting forth the circumstances under which a court of law would hold parties liable or not liable, stating that it could not "be argued that Congress intended EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants." *Kelley v. EPA*, 15 F.3d at 1107. Likewise, in *Redwing Carriers v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996), the Eleventh Circuit refused to defer to the EPA's determination of who was liable for a superfund site clean-up. The court distinguished an agency's legislative powers, which were entitled to deference, and its prosecutorial powers, which were not: "Although the EPA's view of who is liable for cleaning up the Saraland Site may support Redwing's case, neither the district court nor this court are obliged to defer to the agency's conclusions on this issue. Courts, not the EPA, are the adjudicators of the scope

of CERCLA liability." *Id.* at 1507 n.24. In *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), the Ninth Circuit refused to defer the agency's interpretation of the Fair Housing Act in an enforcement action stating, "Justice dictates, however, that our general rule of deference to announcements of law by adjudication has its exceptions. . . ." *Id.* at 748.

Finally, in *Dico, Inc. v. Diamond,* 35 F.3d 348 (8th Cir. 1994), the court of appeals for the Eighth Circuit specifically rejected EPA's claim that it possessed the ultimate authority to resolve liability issues under CERCLA and that it decisions were thus entitled to *Chevron* deference. The court held that while EPA has most of the responsibility for administering CERCLA, EPA does not the ultimate authority to resolve issues of liability under the statute. Id. at 350. *Accord Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 541-46 (1987)(stating that under Alaska National Interest Lands Conservation Act, district court has equitable discretion to determine what is in "public interest"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319-20 (1982) (construing Federal Water Pollution Control Act as leaving courts their traditional equitable discretionary powers to balance competing claims); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946)(stating that in enforcement proceeding under Emergency Price Control Act district court has broad and flexible equitable powers unless statute clearly restricts court's equitable jurisdiction).

By stretching the *Chevron* doctrine to apply to instances where the power of the court is invoked to impose a penalty for violation of an agency created and interpreted rule, the court below has created a rule that requires courts to abdicate their responsibility as the ultimate arbiter of what the law is thereby destroying the balance of power intended by the framers of our Constitution. Hence, review by this court is necessary to review this decision and provide guidance to the lower courts which are currently split on

whether deference in cases where the agency is enforcing its own unpublished interpretation under a strict liability statute is warranted.

II. This case also raises an important constitutional issue that needs resolution by this Court – whether the imposition of penalties before it is possible to comply -- encourages agency entrapment of innocent violators contrary to the requirements of the Due Process Clause of the Fifth Amendment.

The fact that the courts below felt bound by the Chevron doctrine to "rubber stamp" the EPA's strict liability decision in this case also meant that the court below failed to test adequately the agency's decision to impose liability and asses monetary penalties under the Due Process Clause of the Fifth Amendment. The Due Process Clause of the Fifth Amendment demands that persons not be deprived of life, liberty or property without receiving fair notice. U.S. CONST. amend. V. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)(holding that the Due Process Clause of the Fourteenth Amendment requires that a deprivation of life, liberty, or property be preceded by fair notice). Although this Court has not set forth what constitutes "fair notice" in the context of regulatory enforcement actions, lower courts have largely agreed that agencies are required to give "fair notice" of these interpretations before civil sanctions may be imposed for violations based upon the interpretations. *See, e.g., General Electric Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)("In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.").

In the present case, the both the trial court and the Fourth Circuit held that HCC did not have fair notice until

August, 1989 of EPA's interpretation of the term "use" pursuant to the benzene NESHAP to include multiple counting of the same benzene quantity when recycled through plant equipment, rather than the total volume of benzene actually consumed by the plant. Pet. App 20a, 65a. The result of EPA's interpretation of the rule was to drastically increase the amount of benzene that HCC was required to report as "used", thus effectively eliminating the 1000 megagram exemption. The courts below, however, held that the lack of fair notice between 1984 and 1989 prevented HCC from being held liable for penalties during that period based on EPA's multiple counting interpretation.

The Fourth Circuit, however, held that HCC could be held liable for violating NESHAP standards a mere 90 days after HCC gained actual notice of EPA's interpretation in August 1989. Pet. App. 25a. This raises the question of whether a 90- day period between notice of prohibited conduct and ensuing penalties can be considered "fair" notice in satisfaction of the Due Process Clause.

This Court has held that 'fair' notice under the Due Process Clause must also be 'timely' notice. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court held that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, *so that he may act accordingly*." *Id.* at 108 (emphasis added).

Within the context of agency regulatory interpretation, the Court emphasized that agencies must provide the regulated public adequate time after notification of regulatory interpretations to bring their conduct into line with the interpretation. *Martin v. OSHRC*, 499 U.S. 144, 158 (1991)("[t]he decision to use a citation as the initial means

for announcing a particular interpretation may bear on the adequacy of notice to regulated parties . . .").

In the present case, the Fourth Circuit held that HCC was liable for noncompliance with the NESHAP regulation beginning 90 days after receiving actual notice of EPA's interpretation of what constituted "use" of benzene because the regulation itself provided for a 90-day period after the effective date of the rule for existing plants to come into compliance with the standard. Pet. App. 25a. The Fourth Circuit, however, completely fails to address the issue of how such a 90-day period could constitute 'timely' notice of the EPA interpretation sufficient to allow HCC to bring its plants into conformance with the interpretation. Indeed, it seems likely that the court below would have allowed for a shorter period between HCC's notification of the EPA interpretation and HCC's resulting liability for noncompliance had the NESHAP regulation so provided.

The 90-day compliance period in the benzene regulations, however, is tied to the effective date of the regulation, not from the date that the public was given notice of the regulation. 40 C.F.R § 61.05(c)(1997). In this case, the regulation was first proposed in 1981, three years before the final rule became effective. Pet. App. 85a. Accordingly, affected industries had at least three years notice of the EPA's proposed regulation of benzene. Indeed, the Administrative Procedure Act itself requires that the public be given notice of a proposed regulation before the regulation can become effective. 5 U.S.C. 553 (b). Therefore, it seems reasonable to believe that the 90-day provision was inserted into the benzene regulations with the understanding that the affected industries had already been on notice of the proposed regulation for three years with sufficient time to prepare their plants to comply with the regulation. It is wholly unrealistic that EPA expected factories to be entirely

overhauled to meet drastically different air pollution standards in only 90 days.

By holding Petitioner knowing that it would have been impossible to have complied with the most recent agency interpretation, the Fourth Circuit is essentially holding that penalties for prohibited conduct can be assessed simultaneously with notification of the prohibition. Providing untimely notice for the public to bring its conduct into compliance with the law is functionally the same as providing no notice whatsoever because either way the public is left with no option to avoid being penalized for noncompliance. This brings the Fourth Circuit squarely into conflict with the requirements of Due Process Clause set forth above. The practical effect of this case will be to tell agencies that they can play "hide the ball" with their regulatory interpretations, and successfully seek sanctions anytime they wish without even giving the regulated public an opportunity to come into compliance with the interpretations. Accordingly, there is a substantial constitutional issue raised in this case that needs resolution by this Court.

III. Finally, this case affords this Court an opportunity to provide guidance to federal agencies regarding when penalties can be legitimately imposed in order to achieve regulatory compliance consistent with the overall regulatory objective and when the imposition of such penalties constitutes nothing more than an abuse of regulatory power.

In *Pfaff v. HUD*, 88 F.3d 739 (9th Cir. 1996), the Ninth Circuit Court of Appeals struck down HUD's interpretation of the Fair Housing Act as "arbitrary and capricious" and in so doing, expressed the collective frustration of the regulated community regarding vague enforcement standards:

> We are most troubled that in this especially complex area of the law, in which private individuals may be subject to heavy-handed enforcement proceedings, the Secretary has done so little to enlighten the public as to what he expects of them. HUD should spare a thought for the law-abiding property owner, because the familial status amendment presents particularly difficult questions of compliance. . . . It is one of HUD's functions to develop expertise on the problem of housing discrimination. . . . and, on the basis of this expertise, to exercise its broad powers of enforcement and regulation. If HUD finds the line-drawing question difficult, imagine the position of Karl and Elizabeth Pfaff.

Id. at 749 (citations omitted).

In the area of environmental policy, the subject of the instant lawsuit, enforcement of and compliance with agency regulations is the chief means of achieving environmental policy. Yet, given the thousands of pages of environmental regulations on the books, there are abundant areas of complexity and confusion, and hence, plenty of opportunities for agencies to "catch" American businesses in violation of environmental regulations. There are, for example, approximately 1,000 pages of RCRA regulations, 4,000 pages of Clean Air Act regulations, 2,400 pages of Clean Water Act regulations. Richard Lazarus, "Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law," 83 Geo. L.J. 2536 (1995). Indeed, in a recent survey of the general counsels for major American corporations, seventy percent of the respondents stated that full compliance with all federal and state environmental laws was impossible, largely because

of complexity. Marianne Lavelle, "Environmental Vise: Law Compliance," 30 Nat'l L.J. S1 (1993).

The Ninth Circuit held in *Pfaff*, that this type of enforcement scheme did not serve a legitimate purpose and was arbitrary and capricious. *Pfaff*, 88 F.3d at 748. At a minimum, if environmental regulations are so complex or inconsistent that they cannot be easily understood or complied with, plainly fails to protect the environment because the regulated community cannot figure out what it must do – and therefore does not do it. This case well illustrates that regulations promulgated to protect the environment are effective only to the extent that their requirements are known and understood. Hence, this case affords this Court an opportunity to require federal agencies to communicate clearly its interpretations of federal regulations in order to enhance environmental compliance across the board.

CONCLUSION

Accordingly, for all the foregoing reasons, *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari.

Respectfully submitted,

Nancie G. Marzulla
DEFENDERS OF
PROPERTY RIGHTS
1350 Connecticut Ave.,
N.W.
Suite 410
Washington, D.C. 20036
(202) 822-6770

April 22, 1998